162 US 359

TRANSCRIPT OF RECORD.

162-359

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 184.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

HUGH CHARLESS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED NOVEMBER 3, 1892.

(15,187.)

I have had no opportunity to examine the briefs of the opposition until two days ago, and in this connection I would respectfully ask this Court to consider the advisability of so amending its rules, as to require the plaintiff in error to serve his brief upon the opposite party within a reasonable time, before the commencement of the term on which the case is placed upon the calendar for hearing. This is the rule in nearly all of the State Supreme Courts.

Respectfully submitted.

HENRY J. GJERTSEN,
Of Counsel for Defendant in Error.

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a United States Circuit Court of Appeals for the 9th Circuit, October Term, 1891.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error. } No. 20.

Transcript of Record on Writ of Error.

Endorsed: Filed January 15th, 1892. F. D. Monckton, clerk.

1 In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Spokane Falls, in Spokane County, in said Territory.

HUGH CHARLESS, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Complaint.

The plaintiff above named complains and alleges:

1. That — all the times hereinafter set forth defendant was, and now is, a corporation, organized under the laws of the United States and doing business in Washington Territory, and owned and operated a railroad running from Cheney, in Spokane county, Washington Territory, westward through said Territory.

2. That in the operation of said railroad it was necessary at all times to keep in employment and service of defendant a number of laborers for the maintainance of defendant's track and road-bed of said road, and it became and was defendant's duty, in the employment of said laborers in said service, to furnish them with competent and efficient means and appliances for the proper discharge of their duties in said service and to furnish them with necessary information as to the passing of trains on defendant's road to protect themselves from injury by such trains while engaged in said service.

3. That on, to wit, the 28th day of August, A. D. 1886, plaintiff was one of defendant's said servants and employés, whose duty it was to maintain defendant's said track and road-bed, under the charge, control and superintendency of one William Kirk, who was then section boss of the section running west from the said Cheney, and who, as such section boss, — the agent of the defendant in maintaining the track and road-bed of defendant's said road on said section, and had the superintendence, direction and control of said work and of the means and appliances therefor.

4. That at said date and thereafter defendant had in its employ at said Cheney a telegraph operator whose duty it was to know

2 the times of the passing of trains over defendant's said road in the vicinity of Cheney, and the times of their arrival and departure therefrom, and to inform all defendant's servants and employés whose safety and welfare might be endangered thereby of the times of the running of such trains, and it was defendant's duty to inform said telegraph operator of such running of such trains, and it was defendant's duty to so operate and run its said trains, and to so inform its servants and employés thereof, as not to endanger the lives or persons of such servants and employés while engaged in the service of defendant.

5. That in the carrying on of said work of maintaining said track and road-bed, it became and was necessary for said servants and employés to use a certain hand car which was then and there under the direction and control of said section boss, which hand car was sufficient for its ordinary uses, but in case of imminent danger from collision it was defective in not having a sufficient brake, which, instead of having brake-blocks to rub and stop the wheels, was only a short piece of timber fastened to said car at one end and made to rub upon one of the wheels by pressing thereon with the foot; that said section boss and the said roadmaster of said defendant, the proper officers of defendant, whose duty it was to furnish and provide said hand car, knew before the accident hereinafter set forth of said defect, but they told plaintiff then that the same was sufficient for the purposes of its use, and plaintiff knew no different until the happening of said accident.

6. That on said date, while in the service and employment of the defendant as aforesaid, and during working hours, plaintiff, together with other like servants and employés of defendant, under the direction and superintendency of said section boss and with the knowledge of said telegraph operator, left said Cheney on said hand car, going west on said hand car on said section in the discharge of this duty in said service and employment, being ignorant of any approaching train on said road from the west, and of any danger to his person on account of the running — defendant of any train in that vicinity; that when about two miles west from the said Cheney, and a deep cut and curve in defendant's said road, sufficient to obscure an approaching train, while plaintiff was standing on the front end of said hand car working at the lever propelling the same, with his back towards the direction in which they were going, said section boss standing on the rear end of said hand car looking in the direction they were going, having full charge, control and direction of said hand car, which was then running at the rate of about ten miles an hour, said section

3 boss for the first time informed plaintiff that a freight train traveling east on said road was about due there at that place; that plaintiff knew that said hand car was then not far from said cut and curve in said road, — immediately became apprehensive for his personal safety; that immediately upon informing plaintiff that said train was then about due at said place, said section boss exclaimed: "There she comes now, put on the brake;" that immediately thereupon one of said servants and employés nearest said

brake put on said brake, and tried the best he could to stop said hand car with said brake, and the plaintiff tried the best he could to stop said hand car by means of the lever at which he was then working, but said brake and plaintiff's said efforts failed to stop said hand car, or to diminish its speed sufficient, as it appeared to plaintiff, to prevent a collision with said approaching train; whereupon plaintiff turned to see how near said train was to them and what the chances were of escape, and saw said train but a short distance from them, and approaching very rapidly, without slacking its speed, and it appeared to plaintiff that a collision with said train was inevitable and that his life would be lost thereby, unless he did something upon that instant to save his life; that at that time there were tools and different kinds of repair materials on said hand car, so arranged along the sides of said hand car, that it appeared to plaintiff that it would be impossible for him to reach either side of said hand car to jump therefrom to the side of the track of said road, but it did appear to him that he could jump from the front end of said hand car to the side of said road and avoid injury, and with this belief plaintiff did jump with the intention of thus saving his life; that when plaintiff jumped from said hand car as aforesaid, instead of alighting upon his feet on the side of said road, as he expected, he fell onto the road between the rails, and before he could recover himself said hand car was about to run over him when lying on his back; he put up his feet against the approaching hand car to stop it and prevent its running over him, but that said hand car was coming towards him with such velocity and momentum that he could not stop it, and it ran over and upon him in such a way as to break and dislocate one of the vertebræ near the middle of his spinal column, and to cause him other great and permanent injuries about his back, chest and legs.

That the obstruction of his body under said hand car stopped it in time for the other servants employés of defendant to get off and drag it off said road, together with plaintiff, who was fastened to the under part of said hand car, just in time for said train to
4 pass by without striking it; that during all of said time the engineer and conductor of said freight train knew of the danger in which plaintiff was then placed and of a collision with said hand car, and of the probability thereby of injuring and killing plaintiff, yet said engineer and conductor of said train negligently and recklessly failed and refused to slacken the speed of said train, and continued all of said time to run said train at a great speed, to wit, of twenty-five miles an hour, thereby causing plaintiff great fear of immediate death by said train running over him, and causing him to make the efforts to save his life as hereinbefore stated.

7. That defendant and defendant's said telegraph operator at said Cheney well knew that plaintiff left said Cheney on said hand car as aforesaid, and that a freight train was about due at that place going east, and that said hand car in going west on said section at that time would be in great danger of a collision with said freight train, and the plaintiff thereon would then be in great danger of personal injury and of loss of his life thereby.

That said telegraph operator negligently and recklessly failed, neglected and refused to inform plaintiff thereof, whereof plaintiff was compelled, caused and allowed by defendant and its said agents and servants to be placed in the position of great imminent peril and danger as hereinbefore described, which, without his fault, resulted in the injury to him as hereinbefore stated; that plaintiff relied on the said assurance of said section boss and of the said roadmaster, officers of defendant, whose duty it was to provide and furnish said hand car, that the said brake on said hand car was sufficient, himself not knowing to the contrary; that, in fact said brake on said hand car was not sufficient to stop said hand car as quickly as it ought to have been stopped, when about to come into collision with said freight train as hereinbefore stated, and if said brake had been sufficient and made and operated as hand-car brakes are and were then usually made and operated, with brake-blocks to rub the wheels, said hand car would have been stopped in ample time on said occasion to have allowed plaintiff to get off said hand car without danger to himself, and plaintiff would not have been placed in the position of great peril and imminent danger of losing his life as he was on said occasion; that defendant negligently and knowingly permitted and caused plaintiff to use in its service said hand car having said defective brake, whereby plaintiff, on said occasion, was made and caused to rely on the sufficiency of said brake until he had to jump from said hand car as aforesaid, causing the plaintiff the injuries hereinbefore stated.

8. That plaintiff's said injuries are permanent and cannot be healed or cured, the injured vertebræ pressing on the spinal cord causing paralysis of his lower limbs and the lower part of his body, injuring the circulation of the blood in said parts, whereby he is and has been ever since said accident totally disabled from manual labor, from walking or going about in any way, to earn his living, and his general health has been greatly impaired, so that from and since said accident and on account of said injuries he has not been able to take care of himself and had to have constant attendance to minister to his necessary wants, which condition will continue the remainder of his life; that, on account of said accident, he has suffered great physical pain and mental anguish.

That on account of said injuries plaintiff is damaged in the sum of twenty-five thousand dollars.

For a second and further cause of action, plaintiff says:

1. That on, to wit, the 28th day of August, 1886, plaintiff was a servant and employé of the said defendant, and that on said date, while in the discharge of his duties in such service and employment at a place near the town of Cheney, Spokane county, Washington Territory, one of defendant's hand cars ran against and upon plaintiff, dislocating one of the vertebræ of his spinal column near the middle of his back, causing paralysis of his lower limbs and the lower part of his body, injuring his kidneys and causing him other great and serious injuries.

2. That immediately upon and after the time that plaintiff re-

ceived said injuries, defendant transported plaintiff to its hospital at Missoula, Montana Territory, and undertook to render and furnish plaintiff proper and skillful medical and surgical treatment and care in said hospital for his said injuries, and for that purpose employed and furnished one Doctor Hooton to treat plaintiff in said hospital for said injuries.

3. That plaintiff being then without means and unable to earn anything on account of said injuries, submitted himself to the care and medical and surgical treatment of defendant by the said Doctor Hooton and its nurse, aids, helpers and attendants at said hospital, and relied upon defendant's said undertaking and promises to have and cause plaintiff to be treated with proper care and skill for his said injuries, which facts defendant then well knew.

4. That plaintiff is informed and believes, and so states upon such information and belief, that at that time there were and were then known to the medical and surgical profession certain medical, surgical and remedial appliances, the names of which are to
6 plaintiff unknown, such as suspending by the shoulders, stretchers, braces, compresses and by medicines, by the proper use of which the plaintiff could have been almost, if not entirely, healed and cured of his said injuries, and that it was then the duty of said Doctor Hooton and his assistants to use such appliances and medicines for the healing of plaintiff's said injuries, and it was then the duty of said defendant to have and cause said appliances and medicines so to be used.

5. That the said Doctor Hooton and the said defendant then and there, and continuously thereafter, utterly failed, neglected and refused to use, or to have or caused to be used, such appliances and medicines for the healing or attempting to heal plaintiff of his said injuries, and willfully and negligently failed, neglected and refused to use any remedies of any kind whatsoever for the healing of plaintiff's said injuries, and willfully and negligently allowed and permitted plaintiff to lie on a bed in defendant's said hospital for the space of about eleven months without proper care and attention; and that on account of said neglect and want of proper care and attention, plaintiff's said injuries were not healed nor in any way or degree mitigated, but were thereby rendered, permitted and incurable, by reason whereof plaintiff has been rendered a cripple for the remainder of his life, unable to walk or move his lower limbs or the lower part of his body, his kidneys and other internal organs affected and otherwise disabled to such an extent that he requires constant attention and attendance, and has to depend upon charity for support, which condition, he is informed and believes, and so alleges, will continue during the remainder of his life, to his great damage of, to wit, in the sum of twenty-five thousand dollars.

Wherefore plaintiff prays judgment against the defendant in the sum of twenty-five thousand dollars and his costs of suit.

A. K. McBROOM AND L. H. PRATHER,
Attorneys for Plaintiff.

HUGH CHARLESS.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

Hugh Charless, being duly sworn, on oath says: That he is the plaintiff named in the foregoing complaint; that he has read
7 said complaint and knows the contents thereof, and that the same is true, as he verily believes.

HUGH CHARLESS.

Subscribed and sworn to before me this 5th day of June, A. D. 1889.

[SEAL.] A. K. McBROOM,
Notary Public.

In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Spokane Falls, W. T.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Now comes defendant and demurs to so much of plaintiff's complaint as is designated as first cause of action, and for ground of demurrer thereto says that the same does not state facts sufficient to constitute a cause of action.

MITCHELL, ASHTON & CHAPMAN,
Attorneys for Defendant.

In the Circuit Court of the United States, District of Washington, Eastern Division, Ninth Judicial Circuit, Terms at Spokane Falls.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Order.

The demurrer of the defendant to the first cause of action in plaintiff's complaint having been brought on to be heard this 5th day of September, 1890, and after argument of counsel and the court being fully advised in the premises, it is the judgment of the court that said demurrer be and hereby is overruled, and defendant is given until Monday, the 8th inst., to answer; and the motion of defendant to strike from plaintiff's complaint the second cause having been brought on to be heard this 5th day of September, 1890, and the argument of counsel having been heard, and the court being fully advised in the premises, it is the judgment of the court that said motion be and hereby is granted.

C. H. HANFORD, *Judge.*

8 In the Circuit Court of the United States in and for the Eastern Division of the District of Washington, Ninth Judicial District, Terms at Spokane Falls.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Answer.

Now comes the defendant, and for answer to the first cause of action contained in plaintiff's complaint, says:

First.

That it denies each and every allegation contained in said first cause of action, except that it admits:

1. That defendant was at all the times set forth in said cause of action a corporation and operating a railroad as therein alleged.

2. That plaintiff was, on or about the 28th day of August, 1886, an employé of the defendant as section hand, engaged in the service and work of maintaining and keeping in repair defendant's road on the section east from the station of Cheney.

3. That on or about the said 28th day of August, 1886, the said plaintiff, while on his way to said work on said section, met with an accident, or received some injury through jumping from the hand car on which he was riding, but as to whether the plaintiff received or incurred any injury as the result of said accident, defendant has not sufficient knowledge or information to form a belief, and therefore denies that any injury was received or incurred by said plaintiff on said date, or as the result of said accident, and avers that, if any injury was received or incurred as the result of said accident, it was without any fault or carelessness upon the part of this defendant.

Second.

Defendant denies that plaintiff has been or is damaged by any act or failure of defendant in the sum of twenty-five thousand dollars, or in any sum whatever, or in any manner damaged whatever, or at all; and for a further answer defendant alleges and avers:

1. That all the persons on said hand car, and all persons in any way engaged in the maintenance and keeping of said section of said road in repair, were and are fellow-servants and colaborers with plaintiff, engaged in the same class and character of employment, and they did not, nor either nor any of them, sustain the relation of vice-principal or agent to said company, and they did not,
9 nor either nor any of them, stand as the said company in the relation as vice-principal or agent.

2. That if any injury resulted to said plaintiff, or was occasioned by said accident, the same took place and was occasioned and incurred through the plaintiff's own negligence and carelessness, and without any fault or negligence on the part of the defendant, and that said plaintiff, through his own carelessness and negligence and

that of his own fellow-servants and co-employés, for which defendant is not responsible to said plaintiff, contributed to the same.

Wherefore defendant prays that plaintiff may not have and maintain his action herein, and that defendant may go hence without day, and have judgment for its costs and disbursements in this action.

MITCHELL, ASHTON & CHAPMAN AND
C. A. MOLLOY, *Attorneys for Defendant.*

STATE OF WASHINGTON, } ss:
County of Spokane, }

J. H. Mitchell, Jr., being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing answer, knows its contents and believes the same to be true; that affiant makes this affidavit for the reason that defendant is a foreign corporation, and that there is not within the said county of Spokane any officer or agent of said company upon whom service of process can be made, who is authorized to make this affidavit, and that affiant is familiar with and has knowledge of the facts set forth in said answer.

JOHN H. MITCHELL, JR.

Subscribed and sworn to before me this — day of September, 1890.

L. H. PRATHER,
Notary Public.

In the Circuit Court of the United States, District of Washington, Eastern Division, Ninth Judicial Circuit, Terms at Spokane Falls.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Amended Answer.

Comes now the defendant, by leave of the court first had and obtained, and files this its amended answer to plaintiff's complaint, and alleges:

10 First.

It admits the allegation set forth and contained in the first paragraph of said complaint.

Second.

It admits that it is the duty of defendant to furnish laborers engaged in maintaining the track and road-bed of defendant with necessary information as to the passing of trains on the defendant's road.

Third.

It is without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff was a servant and employé of defendant on the 28th day of August, 1886, and as such then engaged in the duty of maintaining defendant's track and road-bed, and therefore it denies the same.

Fourth.

It denies that plaintiff was maintaining defendant's track and road-bed under the charge, control and superintendency of William Kirk, section boss, west of Cheney, mentioned in said complaint, and denies that plaintiff was so maintaining the same at or about said date, or at any other time.

Fifth.

It denies that said section boss was the agent of this defendant in maintaining said track and road-bed, and denies that he had the superintendence, direction and control of said work, or of the means and appliances thereof.

Sixth.

It denies that it was the duty of the telegraph operator mentioned in plaintiff's complaint to inform all the servants and employés of the defendant (whose safety and welfare might be endangered by the running of trains) of the times of the running of such trains, and denies that it was the duty of the defendant to notify said operator of the same; it denies that it is its duty to so operate and run its trains as to inform all of its employés and servants in such a manner as not to endanger the lives or persons of such servants and employés while engaged in its service.

Seventh.

It denies that the hand car mentioned in the first paragraph of plaintiff's complaint was defective, not having a sufficient
11 brake, and denies that said brake was without brake-locks; denies that said brake was in any manner imperfect or insufficient; denies that said defendant, or its section boss or its road-master mentioned in said complaint, had any knowledge of any defect in said brake, or in any of the parts or appliances of said hand car; denies that said section boss or roadmaster informed plaintiff that the brake referred to was sufficient for the purpose of its use, or that they gave said plaintiff any information with regard to the same, or had any occasion so to do.

Eighth.

Excepting as to the allegation hereinafter specifically denied, it is without any knowledge or information to form a belief as to the truth of the allegations set forth and contained in the sixth paragraph of said complaint, and therefore it denies the same.

Ninth.

It denies that said plaintiff left the station called Cheney and went west on said hand car under the direction and superintendency of the section boss mentioned in said complaint, and with the knowledge of the telegraph operator mentioned therein.

Tenth.

It denies that any servant or employé of the defendant was unable to stop said hand car with the brake hereinbefore referred to, and denies that the plaintiff was unable so to do, and further denies that any servant or employé of this defendant, or that this plaintiff were unable to diminish the speed of said hand car sufficient to prevent a collision with the approaching train, all of which are mentioned and referred to in the sixth paragraph of said complaint.

Eleventh.

It denies that the engineer and conductor of the freight train mentioned in the said sixth paragraph knew of the danger alleged by plaintiff in said paragraph, and denies that said engineer and conductor knew of any impending collision with said hand car, and denies that they had any knowledge of the probability of thereby injuring and killing this plaintiff; and defendant further denies that said engineer or conductor, or any servant or employé of this defendant, negligently and carelessly failed and refused to slacken the speed of said train, and denies that they continued to run said train at the speed of twenty-five miles an hour, or at any great rate of speed; and it further denies that said train was by defendant, its servants, agents or employés, run at said time in a negligent
12 and reckless manner by any one person, or in any manner, or at all, and denies that the defendant, or any of its agents, servants or employés, refused to slacken the speed of said train.

Twelfth.

Excepting as to the allegations contained in the seventh paragraph of said complaint hereinafter specifically denied, this defendant is without any knowledge or information sufficient to form a belief as to the truth of the allegations set forth and contained in said seventh paragraph, and therefore it denies the same.

Thirteenth.

And defendant, for the purpose of specifically denying certain allegations in said seventh paragraph, denies that it, or its telegraph operator referred to in said complaint, knew that this plaintiff would be in great danger of a collision with the freight train mentioned in said paragraph, and denies that said defendant had any knowledge or that said telegraph operator had any knowledge that this plaintiff would be in great danger of personal injury and of loss of life, and defendant further denies that said operator carelessly and

recklessly failed, neglected and refused to inform plaintiff of the danger of said collision, and denies that said operator or this defendant in any manner failed to give this plaintiff any necessary or lawful information on its part to be given to him; denies that plaintiff relied on the assurance of the section boss and of the roadmaster, referred to in said complaint, as to the sufficiency of the break of said hand car, and defendant denies that said section boss and roadmaster were at that time and place, officers of this defendant, and denies that they were officers or vice-principals of defendant, and denies that said roadmaster, section boss or operator were officers or vice-principals, superintendents or managing agents of this defendant at any time mentioned in said complaint; it denies that said brake was not sufficient to stop the hand car mentioned in said complaint as quickly as it ought to have been stopped when about to come into collision with the freight train mentioned and alleged in said complaint, or at any other time, or under any other circumstances; and denies that said brake or any of the appliances of said car were defective in any manner, or at all; defendant further denies that it knowingly or negligently *or* caused to — use in its service the aforesaid hand car, or any hand car having a defective brake.

13 Fourteenth.

It denies that plaintiff's injuries are incurable, and denies that he was at the time mentioned in the complaint, or is now, injured in any manner as alleged in the eighteenth paragraph of said complaint, or at all; and defendant denies that plaintiff was, and denies that — has been since said accident totally disabled from manual labor, and denies that he is prevented from walking about or going about in any way to earn his living; defendant further denies that plaintiff's general health has been greatly impaired, and denies that he has been unable to take care of himself since said accident on account of the injuries mentioned in said complaint, or in any manner on account of said accident; and defendant further denies that plaintiff has had constant attendance, for the purpose of administering to his necessary wants, and denies that he will require such attention during the remainder of his life; defendant further denies that plaintiff has suffered great physical pain and mental anguish on account of the accident alleged in said complaint, and denies that plaintiff, on account of the injuries mentioned therein, is damaged in the sum of twenty-five thousand dollars, or any sum, or in any manner or at all.

Fifteenth.

Defendant denies each and every other allegation set forth and contained in the eighth paragraph of the complaint not hereinbefore denied.

Sixteenth.

And, by way of new matter constituting a defense to this action, defendant alleges: That whatever injury happened or occurred to

the plaintiff herein, occurred and was so occasioned by his own fault and negligence, and he, by his own carelessness and negligence, contributed to and occasioned said injury, and the same happened and occurred without any fault upon the part of, or carelessness and negligence of this defendant, or any of its agents, servants or employés.

Wherefore defendant prays that this case be dismissed, and that it do go hence without day, and that it recover its costs and disbursements herein.

MITCHELL, ASHTON & CHAPMAN AND
C. A. MOLLOY, *Attorneys for Defendant.*

14 STATE OF WASHINGTON, } ss:
County of Spokane, }

J. M. Ashton, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant herein; that all of the agents of this defendant in this county who are competent to verify the foregoing pleading are now absent therefrom; that there is no official superintendent or other employé in Spokane county, in the State of Washington, at this time who is competent to verify the foregoing answer, which is the reason the verification thereto is made by this affiant; that affiant has read the foregoing answer, knows the contents thereof and believes the same to be true.

J. M. ASHTON.

Subscribed and sworn to before me this 15th day of Sept., 1890.

G. M. FORSTER,
Notary Public for the State of Washington, Residing at ——.

The foregoing answer served on plaintiff by copy this 15th day of September, 1890.

McBROOM, PRATHER & DAUSON,
Attorneys for Plaintiff.

In the Circuit Court of the United States, District of Washington, Eastern Division, Ninth Judicial District, Terms at Spokane Falls.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

Comes now the plaintiff in said cause and for reply to defendant's answer herein, denies each and every allegation in said answer contained.

PRATHER & DAUSON AND
A. K. McBROOM,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Hugh Charless, being duly sworn, on oath says that he is plaintiff in said cause; that he has read the foregoing reply and knows the contents thereof and the same is true.

HUGH CHARLESS.

Subscribed and sworn to before me this 15th day of September, 1890.

A. K. McBROOM,
Notary Public.

Service by copy accepted this 16th day of September, 1890.

C. A. MOLLOY,
Attorney for Defendant.

Charge to the Jury—Charless Case.

GENTLEMEN OF THE JURY: This case is one in which the plaintiff seeks to recover damages for an injury to his person occurring through the alleged negligent acts of the defendant. There are two principal elements of the case which are necessary to support his action: The first is the injury. About that there is no question in this case; the plaintiff has been injured. The second important element is the wrong done by the defendant, and it is absolutely necessary for the plaintiff to show by evidence sufficient to overcome, by a fair preponderance in evidence to the contrary, that the injury he has suffered is the result of a wrong done by the defendant.

The wrong which is complained of here is the negligence of the defendant in exposing him to danger and causing the injury, by failing to observe reasonable precautions, which it was its duty to observe, for the protection of this plaintiff and his fellow-workmen. As I said, the burden is on him, if he is going to recover damages, to show that much by evidence, and the evidence must be sufficient to preponderate against what has been introduced to the contrary.

You are exclusive judges of every question of fact involved in the case. You are to take the testimony of the witnesses and determine from it what the truth is, as best you can. You will be at liberty, in weighing this evidence and determining from it what the facts are, to be guided by your experience as men of affairs.

Look upon the witnesses, determine from their appearance, manner of behavior on the witness stand, the testimony which they give as regards its being reasonable and probable, the apparent truthfulness or evasiveness or inconsistencies in any of its parts; consider all these elements in determining the weight you will give to the witnesses.

You should assume at the outset that the defendant has performed its duty; that its servants and agents are men who would and did perform their duty. That assumption is the basis upon which you begin to examine the testimony to see if the evidence

shows that they have failed. It is not a controlling pre-
16 sumption, but simply a presumption, that the defendant has not done a wrong; and then, from that starting point, determine from the testimony in the case whether it is clearly made out that the defendant is guilty of wrong in the matters complained of.

You will assume that the witnesses are truthful, and that they are equally truthful on both sides, and therefore harmonize their testimony, as far as it can be and made consistent with what each has sworn to; but when you have come to a point where there is a conflict in a material point, so that you are obliged, in order to accept one statement, to reject as untrue another statement, then you should weigh the evidence on each side and determine which is true.

You are not obliged to ascertain what is true beyond a reasonable doubt, as criminal cases, but determine, according to your best judgment, in accordance to the greater weight of testimony. That is, if there is testimony on the two sides exactly equal, so that there is no preponderance, you determine contrary to the party whose duty it is to bring proof. If there is not a preponderance in any material point which it is necessary for him to establish by proof, you should find that against him. If there is anything claimed by the defense which it is necessary for the defendant to prove, and there is no such preponderance, resolve that question in favor of the plaintiff and against the defendant.

The parties have asked for some special instructions, which I will give you before I, in general, present the precise question which I think is the one you must necessarily pass upon.

To explain this matter a little more fully, it is a principle in all suits to recover damages for negligence, that the plaintiff cannot recover if the injury to himself was in part owing to his own negligence (or, in law, contributory negligence), even though there was negligence on the part of defendant which caused the injury; if that injury was also in part caused by contributory negligence on the part of the plaintiff, plaintiff cannot recover damages.

It is also a principle governing suits to recover damages by employés against the employer that the employé, as a part of his contract of employment when he goes into the service, assumes on his part the risks and dangers that are ordinarily incident to the service in which he engages. He also assumes on his part that he is competent to perform the service which he undertakes to perform; that he has sufficient knowledge of the tools and implements which he is required to use in the service, to know when they are safe and suitable and to look out for himself against injury resulting from the use of such tools, as are suitable and proper. And it is
17 his duty, if he is handling implements which he knows unsuitable, to give notice of it to his employer; and a failure on his part to perform the duty of giving notice would absolve the employer from liability for injury resulting from such defect.

I think that the case, when stripped of all the side issues and the incidental questions surrounding it, resolves itself into just this question for this jury to determine: Whether the injury to the

plaintiff resulted directly from the negligence of the defendant in needlessly exposing him to the danger of being hurt by a collision between the hand car and the extra freight train at the place where it occurred; or, whether the injury was a mere accident, which was the result of one of the ordinary hazards of the employment in which he was engaged (To which instruction defendant excepts, which exception is allowed.) Whether it was an ordinary risk of his employment, or whether an extraordinary danger caused by a negligence on the part of the defendant. Whether that negligence was a negligence of the foreman in running the hand car too fast up to a point which he knew to be dangerous and which he did not warn the other men working on the hand car of, so that it was impossible for them, without extreme hazard to their lives, to avoid a collision; or, whether the negligence was on the part of the officers in charge of the freight train in approaching a curve in the cut, which obstructed the train from view, or passing a public crossing without giving warning by sounding the whistle or engine bell. (To which instruction the defendant excepts, which exception is allowed.)

If, in any of these respects, there was actual neglect on the part of defendant which placed the plaintiff in a situation of extraordinary danger, something clear beyond the ordinary risks of his employment, and his injury was not in any degree owing to his own negligence at the time, the defendant would be liable to damages, and be liable even though the plaintiff, when in a situation of imminent and apparent danger, may have made a mistake on his part in attempting to escape from the danger, as by attempting to jump in the wrong direction. (To which instruction defendant excepts, which exception is allowed.) Even a mistake of that kind, happening at a moment of extreme peril, would not be regarded as reckless or negligent act on the part of plaintiff which would preclude him from recovering damages. (To which instruction defendant excepts, which exception is allowed.)

But if, on the other hand, this injury to him resulted from his own act in attempting to jump from the hand car, at a time when it was his duty to have remained on the hand car and
18 assist the others in checking its speed, and removing it from the track so as to get it out of the way, and when he had no reasonable cause to regard himself as being in extreme danger; or, if the defendant was entirely guiltless of any negligence; if the foreman was not guilty of imprudence in running the hand car at the rate it was going; if the freight train did not approach a curve or crossing where it was the duty of the engineer to give warning—so that there was no negligence on the part of defendant—then your verdict should be in favor of the defendant. (To which instruction defendant excepts, which exception is allowed.)

If within these principles, you reach the conclusion that the plaintiff is entitled to any damages, you will fix the amount at what you regard is reasonable compensation to him for the injury complained of. The injury complained of is the physical injury resulting from being run over by the hand car at the time. The amount

is not to be enhanced by any conduct, whether commendable or otherwise, on the part of the railroad company subsequent to that time. For such injuries as are the natural consequence of the accident there at that time is all that the plaintiff can recover.

In fixing the amount you have the right to take into consideration his expectancy, which was shown to be thirty-eight years and a fraction, and fix upon what you think would be reasonable compensation to him, as near as you can gauge it in money, for the injury he has suffered. You cannot award any sum in addition to compensation for the mere purpose of punishing the railroad company, or for what is termed exemplary or vindictive damages. Damages are to compensate the plaintiff, not to punish the defendant. Whatever sum you fix upon should be a sum which you in your judgment regard a proper amount, and it would be improper conduct for a jury to ascertain what amount they give a verdict for by any scheme involving a resort to a chance verdict. Juries sometimes allow each member to fix an amount which he is willing to give a verdict for, and add together and strike an average. Any agreement to resort to that kind of scheme to render a verdict for a quotient so made would not be the deliberate judgment of each of the twelve. The amount would be fixed by hazard, and would not be a proper verdict. Whatever verdict you fix as damages, if any, should be the amount that you believe is the proper amount.

This is a case which each juror is required to act reasonable about and endeavor to come to an agreement, an agreement which shall satisfy the mind and judgment of each of the twelve. It is only your unanimous verdict that can be received, but it is
19 your duty to confer together carefully and candidly, not to be unreasonable in undertaking to force your opinion upon others, but to be guided by reason yourself, so as to come to an agreement, such an agreement as will satisfy the conscience of each juror.

In no case can you give the plaintiff more than $25,000, the amount sued for.

Instructions Asked by Plaintiff.

HUGH CHARLESS }
vs.
N. P. R. R. Co. }

The plaintiff asks the court for the following instructions to the jury:

It is the duty of the railroad company to so run its trains and operate its road as not to needlessly endanger the lives or persons of its employés. A violation of this duty causing injury to one of its employés renders the company liable to such employé.

It is the duty of the railroad company to furnish its employés safe and suitable tools and appliances with which to work for the company, and a safe place whereon to perform such work; and that if the jury find from the evidence that the company neglected to

furnish the plaintiff such safe and suitable appliances for said work and such safe place whereon to do such work, whereby plaintiff was injured, to which injury plaintiff by his own negligence did not contribute, then the defendant is liable to the plaintiff for such damages.

If the jury find from the evidence that the hand car in question was a necessary implement in the carrying on of the company's work, and that the said hand car was not sufficiently provided with a sufficient brake to stop it within a proper and reasonable time when in danger of collision with other trains on said road, of which defect plaintiff had no knowledge and could not reasonably be required or expected to have such knowledge, and that by reason of such defective brake plaintiff was injured, without contributing *to* his own negligence to such injury, then the company is liable to plaintiff in damages for such injury. (To the giving of which instructions the defendant excepts.)

If the jury find from the evidence that plaintiff was injured by or on account of defendant's negligence, to which plaintiff did not contribute by his own negligence, then the fact that the negligence of plaintiff's fellow-servants contributed to such injury is no defense to an action by plaintiff for damages on account of such injury. (To the giving of which instruction defendant excepts.)

The company cannot escape liability by imposing upon one of its employés the duty of providing or repairing its implements and tools used by its employés.

The company's employés may be fellow-servants in some particulars and still one of them may be vice-principal, and when one of such employés, as for instance a section boss, is intrusted by the company with the duty of providing or repairing necessary machinery or implements for such service, as for instance a hand car, the use of which might endanger the lives or personal safety of such employes if not a proper and sufficient implement, then such employé or section boss, so far as such repairs or such furnishing of such hand car or implement is concerned, is a vice-principal.

An employé who has charge, control and superintendency of work and other employés, with authority to employ and discharge such employés, is a vice-principal.

If the company promised to furnish in a reasonable time a sufficient hand car, plaintiff had a right to rely for a reasonable time on the company's promise, or that of its agents, to so furnish such hand car, and to continue for a reasonable time in the use of one defective.

(See 100 U. S., 213.)

Instructions Asked by Plaintiff.

U. S. Circuit Court, 9th Circuit, Dist. of Wash., E. Div.

HUGH CHARLESS
vs.
N. P. R. R. Co.

It was the duty of the company to use such care in the protection of its employé- as was commensurate with the dangers of their employment. (To which refusal plaintiff excepts.)

If the company placed its section hands on its road under the necessity of traveling over its road in its employ on a hand car, where trains might pass at any time, and made it the section hands' duty to look out for and avoid all passing trains, it then became the company's duty to furnish such hands with a hand car suitable to such work, and a failure to do so was negligence on the part of the company. If the company furnished such hands with a hand
21 car not suited to such work, whereby the plaintiff, without neglect on his part was injured, then the company is liable in damages to the plaintiff. (To which refusal plaintiff excepts.)

If the company furnished its employés with an insufficient hand car, when it could have reasonably furnished one that was sufficient, and by the use thereof in the service of the company, without neglect on his part, plaintiff was injured, the company is liable to him in damages. (To which refusal plaintiff excepts.)

If the plaintiff did not know of the insufficiency of the brake on the hand car, if the same was insufficient, and such insufficiency was not obvious to a person of ordinary care, then he was not guilty of contributory negligence in continuing in the use of the car. (To which refusal plaintiff excepts.)

If the company's agents, whose duty it was to see that its hand cars were in proper condition, failed to perform such duty, such failure was the negligence of the company. (To which refusal plaintiff excepts.)

If the servant may by care and caution so operate a dangerous and defective machine as not to produce injury to a fellow-servant, this does not exempt a master from liability for an omission to exercise reasonable care and prudence in furnishing safe and suitable appliances. (To which refusal plaintiff excepts.)

Instruction.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

If you find that the plaintiff was injured partly by the negligent acts of a fellow-servant and partly by defects in the hand car or other machinery of the defendant, then the defendant is liable and you should find for the plaintiff.

22 In the United States Circuit Court for the District of Washington, Holding Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Request by Defendant for Instructions.

The defendant requests the court to instruct the jury as follows:

I.

The jury is instructed that, upon the admissions and pleadings and all the undisputed facts in this case, the plaintiff is not entitled to recover, and the verdict of the jury should be for the defendant. (To the refusal of the court to give said instruction defendant excepts.)

II.

The jury are instructed that, the defendant was not a guarantor of the safety of its machinery and appliances, and was only bound to use ordinary care and prudence in the selection and arrangement and care thereof, and had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe. (Plaintiff excepts to the giving of this instruction.)

III.

The defendant was not and is not bound as an employer to insure the absolute safety of the machinery or mechanical appliances which it provided or provides for the use of its employés, nor was it bound to supply the best and safest or newest of appliances for the purpose of securing the safety of those who are employed by it. (Plaintiff excepts to the giving of this instruction.)

IV.

If the plaintiff knew, or had the means of knowing, of any defects in the machinery from which the injury is claimed to have happened, and yet remained in the service of defendant, and continued to use such machinery without giving any notice thereof to defendant, he must be deemed to have assumed the risk of all danger reasonaby to be apprehended from such use, and is entitled to no recovery. (Plaintiff excepts to the giving of this instruction.)

V.

If the plaintiff himself was wanting in such reasonable care and prudence as would have prevented the happening of the ac-
23 cident, he is guilty of contributory negligence, and defendant is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery or appliances through the negligence of the defendant. (Plaintiff excepts to the giving of this instruction.)

VI.

You are instructed that it is not only incumbent upon the plaintiff to show that there was a breach of legal duty by defendant, but the injuries sustained by plaintiff was the direct and natural result and consequence of such neglect or breach. Mere surmise and conjecture that the negligence was the proximate cause of the injury is insufficient. (Plaintiff excepts to the giving of this instruction.)

VII.

The jury is instructed that the plaintiff having been at work upon the same section of the road as a section hand, continuously for several months, during which time a number of the trains passing over said section were irregular or extra trains, not running on schedule time, and liable to pass over said section at any time, the plaintiff was and is chargeable with notice of the practice of defendant to run such trains, and he assumed the risk incident to the service from that cause. (Plaintiff excepts to the giving of this instruction.)

In the Circuit Court of the United States for the District of Washington.

HUGH CHARLESS
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

We, the jury in the case of Hugh Charless, plaintiff, against The Northern Pacific Railroad Company, defendant, find for the plaintiff in the sum of eighteen thousand two hundred and fifty dollars ($18,250).

A. M. BALDWIN, *Foreman.*

24 UNITED STATES OF AMERICA,
State of Washington, County of Spokane, } *ss:*

In the Circuit Court of the United States for the Eastern District of Washington, Holding Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Judgment on Verdict of Jury.

This action came on regularly for trial; the said parties appeared by their attorneys, A. K. McBroom, Prather & Dauson, for the plaintiff, and John H. Mitchell and S. C. Hyde for the defendant.

A jury of twelve persons was regularly impaneled and sworn to try said action.

Witnesses on the part of defendant were sworn and examined.

After hearing the evidence and argument of counsel and instructions of the court, the jury retired to consider on their verdict and

subsequently returned into court with the verdict signed by the foreman, and being called, answered to their names and said: "We, the jury in the case of Hugh Charless, plaintiff, against The Northern Pacific Railroad Company, defendant, find for the plaintiff in the sum of eighteen thousand two hundred and fifty dollars ($18,250)."

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the plaintiff have and recover from the defendant the sum of eighteen thousand two hundred and fifty dollars ($18,250) with interest thereon at the rate of ten per cent. per annum from the date hereof until paid, together with plaintiff's costs and disbursements in this action, amounting to the sum of one hundred and eighteen dollars and seventy-one cents ($118.71).

Dated this 11th day of May, 1891.

C. H. HANFORD, *Judge.*

In the Circuit Court of the United States for the Eastern District of Washington, Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Now, on this 20th day of May, 1891, and of this the April term of this court, upon motion of attorneys for defendant made in open court:

25 A period of thirty days' time from this date be allowed defendant for settling a bill of exceptions in the above-entitled action; there being no objection made thereto, it is here and now ordered that defendant be allowed thirty days' time from this date for the settling of a bill of exceptions in this cause.

C. H. HANFORD, *Judge.*

In the Circuit Court of the United States, District of Washington, Eastern Division, Holding Terms at Spokane Falls.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Motion.

Now comes the defendant herein, by his attorneys, and makes application to the court for an extension of the time allowed for the presentation for settlement and the settlement of the bill of exceptions in the above-entitled cause, for the period of fifteen days after the expiration of the time already allowed by order of this court made May 20, 1891.

This motion is based upon the affidavits of D. T. Phelps and John H. Mitchell, Jr., herewith filed.

MITCHELL, ASHTON & CHAPMAN,
Attorneys for Defendant.

JUNE 10TH, 1891.

Due service hereof admitted, by receipt of a true copy, this 11th day of June, 1891.

A. K. McBROOM AND
L. H. PRATHER,
Attorneys for Plaintiff.

In the Circuit Court of the United States for the District of Washington, Eastern Division, Holding Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Affidavit.

STATE OF WASHINGTON, } ss:
County of Pierce, }

J. H. Mitchell, Jr., being first duly sworn, upon oath deposes and says: That he is one of the attorneys for the defendant in
26 the above-entitled action, and has had charge, control and direction of the management of the defense for said defendant in said cause; that he has also the management, control and direction of the matter of the preparation and presentation for settlement of the bill of exceptions upon behalf of the defendant in the above-entitled cause; that said bill of exceptions cannot be presented for settlement or settled until a transcript of the testimony taken at the trial of said cause can be obtained. That it is necessary to embody in said bill of exceptions a record of the evidence taken, as well as of the other proceedings had in said cause. That affiant is informed by the person who was sworn and acted as stenographer in the above-entitled cause, that he has at the present time, June 10th, 1891, only two-thirds of the said testimony transcribed, and that he will not be able to complete the transcript of said testimony before the 15th day of June, 1891. That affiant knows and believes this to be true.

That by order made by this court, prior to the adjournment thereof, to wit, on the 20th day of May, 1891, the defendant was given thirty days' time from said day within which to present for settlement and have settled a bill of exceptions in the above-entitled cause. That there will not be sufficient time after the 15th day of June, 1891, within which to give notice to plaintiff of the time of the presentation of said bill of exceptions to the judge of said court for such corrections as he or they desire to make, before the expiration of the time allowed by the order of the court. That it is, there-

fore, necessary that an extension of said time should be made for an additional fifteen days.

JOHN H. MITCHELL, JR.

Subscribed and sworn to before me, this 10th day of June, A. D. 1891.

[SEAL.] E. K. YORK,
Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.

Due service hereof admitted by receipt of a true copy, this 11th day of June, 1891.

A. K. McBROOM AND
L. H. PRATHER,
Attorneys for Plaintiff.

27 STATE OF WASHINGTON, } ss:
County of Pierce, }

In the Circuit Court of the United States for the District of Washington, Eastern Division, Holding Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Affidavit.

STATE OF WASHINGTON, } ss:
County of Pierce, }

D. T. Phelps, being first duly sworn, on oath deposes and says: That he is the same D. T. Phelps who was sworn and acted as stenographer in reporting the testimony taken upon the trial of the above-entitled cause in the above-entitled court; that he was at said time employed as stenographer and clerk in the office of Mitchell, Ashton & Chapman, attorneys for defendant, at the city of Tacoma; that, after the above-entitled cause was tried, affiant returned to Tacoma, and in the course of his employment was obliged to go and did go to the supreme court of the State of Washington at Olympia, within a day or two after returning from Spokane; that he was busily engaged during the several days he was at Olympia at work in the course of his employment, which precluded him from giving any attention to the transcribing of the evidence in the above-entitled cause; that upon his return from Olympia to Tacoma he retired from the service and employment of the said attorneys for defendant and entered the service of E. F. Russell & Co., real-estate and mining brokers in the city of Tacoma, where he is now engaged and has been ever since said time.

That he has given all his leisure time to the transcribing of the testimony taken in the above-entitled cause; that so far, having worked diligently at all times when he had leisure to do so, at transcribing said testimony, affiant has only been able to transcribe

about two-thirds of same; that he will not be able to complete the balance thereof before about the 15th day of June, 1891; that he believes that by working upon the same as he has heretofore, he can complete the same by that time.

D. T. PHELPS.

Subscribed and sworn to before me this 9th day of June, A. D. 1891.

[SEAL.] E. R. YORK,
Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.

28 Due service hereof admitted by receipt of a true copy this 11th day of June, 1891.

A. K. McBROOM AND
L. H. PRATHER,
Attorneys for Plaintiff.

In the Circuit Court of the United States, District of Washington, Eastern Division, Holding Terms at Spokane Falls.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Notice of Calling up Motion.

To Hugh Charless and to A. K. McBroom and L. H. Prather, his attorneys:

You and each of you are hereby notified that the above-named defendant has this day filed its application in the above-entitled court for fifteen (15) days' additional time to be granted it within which to present for settlement and have settled a bill of exceptions in the above-entitled cause; the said fifteen days to be in addition to the thirty days' time already granted by order of the court made on May 20th, 1891; and

You are further notified that said application will be called up for hearing before the Honorable C. H. Hanford, United States district judge, who sat as judge of the above-entitled court at the trial of the above-entitled cause, at the United States court-room, on the second floor of the Coleman block, on Front street, in the city of Seattle, in King county, State of Washington, upon Wednesday, the 17th day of June, A. D. 1891, at the hour of 10 o'clock a. m., and that said application will be heard upon the affidavits of D. T. Phelps and John H. Mitchell, Jr., filed and served herewith.

MITCHELL, ASHTON & CHAPMAN,
Attorneys for Defendant.

Dated June 11th, 1891.

In the Circuit Court of the United States, District of Washington, Eastern Division, Holding Terms at Spokane Falls.

HUGH CHARLESS
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

This case coming on to be heard on this 17th day of June, 1891, upon the application of the defendant for an extension for
29 the settlement of the bill of exceptions herein, J. H. Mitchell, Jr., appearing for defendant, and no one appearing on behalf of plaintiff or contesting said application, and it appearing that plaintiff had due notice of this application, and the court being fully advised in the premises, it is hereby—

Ordered: That said defendant be, and hereby is, granted further time within which to present for settlement and for the settlement of the bill of exceptions in the above-entitled cause for the period of fifteen days from and after the expiration of the time hereto allowed by order of this court, to wit, until the 4th day of July, 1891.

Done in open court, this 17th day of June, 1891.

C. H. HANFORD, *Judge.*

In the Circuit Court of the United States, District of Washington, Eastern Division, Holding Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Motion.

Now comes the defendant herein, by its attorneys, and makes application to the court for an extension of the time allowed for the presentation and the settlement of the bill of exceptions in the above-entitled cause for the period of twenty days after the expiration of the time already allowed by order of this court made May 20th, 1891, and extended by order of the court made June 17th, 1891.

This motion is based upon the affidavit of John H. Mitchell, Jr., herewith filed.

MITCHELL, ASHTON & CHAPMAN,
Attorneys for Defendant.

June 29, 1891.

In the Circuit Court of the United States for the District of Washington, Eastern Division, Holding Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Affidavit.

STATE OF WASHINGTON, }
County of Pierce, } *ss:*

J. H. Mitchell, Jr., being first duly sworn, upon oath deposes and says: That he is one of the attorneys for the defendant in the above-entitled action, and has had charge, control and direction of the management of the defense for said defendant in said cause; that he has also the management, control and direction of the matter of the preparation and presentation for settlement of the bill of exceptions upon behalf of the defendant in the above-entitled cause; that said bill of exceptions cannot be presented for settlement or settled until a transcript of the testimony taken at the trial of said cause can be obtained; that it is necessary to embody in said bill of exceptions a record of the evidence taken, as well as of the other proceedings had in said cause; that the person who was sworn and acted as stenographer in the trial of the above-entitled cause did not complete the transcribing of said testimony by the 15th day of June, 1891, as was expected at the time when obtaining the previous order for an extension of time, although he worked diligently while able to do so, when not attending to the duties for which he was employed by others over whom this affiant or the said defendant has no control; although said stenographer worked diligently in transcribing said testimony, it was not completed until after the order heretofore made by the court extending the time for the presentation and settlement of the bill of exceptions, and was not delivered at the office of affiant until after said order was made; that at said time, when delivered at affiant's office in Tacoma, affiant was absent at Seattle engaged in the trial of jury causes in the United States circuit court at that place, where he had been delayed in the trial, and in connection with the trial, of various cases almost continuously to the present time; that said transcript, just completed by said stenographer, when left at the office of affiant, was not called to the attention of affiant by said stenographer, or any word left for affiant in relation to the same, and affiant did not receive the same until his return home from Seattle; that as the said transcript was not completed by the 15th day of June, as was
31 expected at the time when the former application for extension until July 3d was made, there was not sufficient time, after the time of the delivery of said transcript, within which to give notice to plaintiff of the time of presentation of said bill of exceptions to the judge of said court for such corrections as he or they might desire to make, before the expiration of the time allowed

by the order of the court extending the time until July 3d; that it is, therefore, necessary that an additional extension of time should be made; that in order to give the necessary notice required by the rules, and to allow time for the serving of amendments and objections thereto, twenty days' further time from and after the 3d day of July will be required.

J. H. MITCHELL, JR.

Subscribed and sworn to before me this 29th day of June, 1891.

W. O. CHAPMAN,
Notary Public, Residing at Tacoma, Washington.

In the Circuit Court of the United States, District of Washington, Eastern Division, Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Notice of Calling up Motion.

To Hugh Charless and to A. K. McBroom and L. H. Prather, his attorneys:

You and each of you are hereby notified that the above-named defendant had this day filed its application in the above-entitled court for twenty days' additional time to be granted it within which to present for settlement and have settled a bill of exceptions in the above-entitled cause; the said twenty days to be in addition to the thirty days' time already granted by order of the court made on May 20th, 1891, and the fifteen days' further time granted by order of the court made on June 17th, 1891; and

You are further notified that the said application will be called up for hearing before the Honorable C. H. Hanford, United States district judge, who sat as judge of the above-entitled court at the trial of the above-entitled cause at the United States court-room, on the second floor of the Coleman block, on Front street, in the city of Seattle, in King county, State of Washington, upon Fri-32 day, the 3d day of July, A. D. 1891, at the hour of 2 o'clock p. m., and that said application will be heard upon the affidavit of J. H. Mitchell, Jr., filed and served herewith.

MITCHELL, ASHTON & CHAPMAN,
Attorneys for Defendant.

Dated June 29, 1891.

In the U. S. Circuit Court, Ninth Circuit, District of Washington, Northern Division, Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The motion of defendant for extension of twenty days' time from this date within which to present and have settled a bill of excep-

tions herein having been brought on to be heard, and it appearing that due notice was given to counsel for plaintiff of the time and place of presentation of said motion, and no one appearing to object to said application, the same is here and now granted, and it is here and now ordered that the time for the presentation and settlement of a bill of exceptions herein be and hereby is extended for a period of twenty days from this 3d day of July, 1891.

C. H. HANFORD, *Judge*.

Done at Seattle, July 3d, 1891.

In the Circuit Court of the United States for the Ninth Judicial Circuit, in the District of Washington, Eastern Division, Terms at Spokane, Washington.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Stipulation.

A bill of exceptions having this day been tendered and submitted to counsel for plaintiff by counsel for defendant for such amendments or corrections as counsel for plaintiff may deem proper to be made therein, it is hereby mutually stipulated and agreed, by and between the parties to this action, by their respective counsel, that counsel for plaintiff may have sixteen days from this date within which to return to counsel for defendant the said bill of exceptions, with such amendments and corrections as counsel for plaintiff may deem proper to be made in the premises, and that if counsel for defendant shall see fit to
33 contest any of said amendments or corrections, then counsel for defendant shall have fifteen days after receipt of said bill from counsel for plaintiff, with the amendments and corrections suggested by the latter, within which to consider said corrections and amendments, and for preparation for making contest thereto; provided that said counsel for defendant shall, within said fifteen days' time, give to said counsel for plaintiff five days' notice in writing of the time and place of the presentation of the said bill of exceptions to the judge of the said court, for his determination of the controversy relative to said amendments and corrections, and settlement of said bill; provided, however, that said notice shall embody, or there shall accompany it, a statement showing the objections of counsel for defendant to said amendments and corrections, as the same are intended to be presented to said court at the time of the presentation of said bill of exceptions. If counsel for plaintiff does not see fit to make any corrections or amendments to said bill, the time provided for its return by them shall be the same as in this stipulation provided for its return in case of amendments and corrections being suggested.

It is further provided hereby that if said bill is returned by counsel for plaintiff without corrections or amendments, or if counsel for

defendant conclude not to make any objections thereto, the said bill may be presented by counsel for defendant to the judge of said court for settlement any time within ten days from the time of its receipt by counsel for defendant, without any notice of the time and place of such presentation, to any of counsel for plaintiff or any one, provided the same is presented without alteration.

And it is mutually agreed by this stipulation that the time for the settlement of the bill of exceptions mentioned is hereby extended to cover the limits and periods of time herein mentioned; provided, that when the said bill of exceptions is presented to the said judge for settlement, and his allowance within any of the several periods mentioned herein, according as the circumstances mentioned herein may require, if the said judge shall not then, at the time of the said presentation of said bill, have the time to give it consideration and settle the same, or if the said judge shall deem it proper to take time to look over the bill at length and in detail before signing and certifying to it, the period of fifteen days' time from the date of receipt of said bill by said judge may be taken for the consideration, settlement and signing of said bill by said judge, to which further time the period within which the said bill may be settled is by this stipulation extended.

And it is further stipulated that this stipulation is a waiver
34 of all questions or objections as to the time within which said bill may be settled, if only it is settled within any of the several periods mentioned herein, as the circumstances mentioned herein may require or permit.

Dated at Spokane, this 14th day of July, 1891.

A. K. McBROOM AND L. H. PRATHER,
Attorneys for Plaintiff.
MITCHELL, ASHTON & CHAPMAN,
Attorneys for Defendant.

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Washington, Eastern Division, Holding Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Bill of Exceptions.

(Testimony paged at top, bill paged at bottom.)

A. K. McBroom and Prather & Dauson, attorneys for plaintiff.

Mitchell, Ashton & Chapman, and Hyde, McBride & Allen, attorneys for defendant.

Prior to the trial of this cause, and before answering to the complaint, the defendant interposed a demurrer to the first cause of action, upon the ground that the same did not state facts sufficient to constitute a cause of action, and at the same time filed a motion

to strike the second cause of action in the complaint, on the ground that the same was frivolous, irrelevant and redundant matter; that subsequent to the interposing of said demurrer and the filing of said motion, and prior to the trial of said cause, the court granted said motion to strike, but overruled said demurrer; that at the time that the order of the court was made overruling said demurrer, this defendant excepted to the order of the court in that respect, and said exception was then and there allowed; that upon the granting of said defendant's motion to strike, the plaintiff elected to stand upon its complaint as stricken in accordance with the order upon said motion; that the case subsequently, at the April term of the said court for the year 1891, proceeded to trial; that during the said trial of said cause, and while plaintiff was presenting his case to the jury, the introduction of the following testimony by plaintiff was objected to by the defendant, which said objections were overruled by the court; to which said order of the court
35 overruling said objections the defendant then and there excepted, which said exceptions were then and there allowed by the court; which said testimony, objected to as aforesaid, and the said objections and the rulings of the court thereon, as well as the exceptions and the allowances thereof, are as follows, to wit:

The plaintiff having been called as a witness, and having stated where he resided, and that he was the plaintiff in the case, he was requested by his counsel as follows (see question No. 3, page 1 of testimony): "Turn to the jury and tell them the facts in the case, commencing at the time of your employment by the Northern Pacific Railroad Company, and tell them the complete story;" and in response to said request the plaintiff proceeded and made the following statement: "I was hired out to the Northern Pacific section foreman some time in the month of May, 1886. I worked for him until some time close on July; moved up to Idaho, and they put us to another foreman named Kirk. During the time when Kirk came there he was sick. They got another man who was foreman some days before Kirk took charge. When I worked for the first foreman we had a car there which was my first section work. I had worked on right of ways and timber-work, etc. When I went to work we had a car there, and the brake we had for it was a stick. There was a jack that they used to raise the track; it is over fifty pounds, solid bunch of iron, with an arm to raise the track. We used to raise the track with this, and the stake we used to stick into it, we used to use that for a brake. When he wanted to stop the car he would stick it into the spoke and stop the car. We used it until Kirk became our foreman. One day after Kirk became our foreman a train was coming after us. Kirk never attended to this himself; he left it to some man or any man, and the man that was using it that day tried to put it in, but in place of doing so he hit the spokes and they knocked it out of his hand. We had a great time to stop the car, and a narrow escape in getting off. So for awhile we worked along there, and one night a wheel broke off and we had to take the thing in on three wheels, and the body was broken also."

That at this point in the plaintiff's statement counsel for defend-

ant objected to the course in which the taking of testimony was proceeding, and announced to the court that the witness was making a statement of matter immaterial to the issues involved in the case, and incompetent, as being hearsay, and not the best of evidence, and which was objectionable for that reason; and that counsel for defendant desired to interpose such objections, but that owing
36 to the fact that the testimony was being given in narrative form, there was no opportunity given counsel for defendant to properly interpose such objections as were desirable, and that on that account an improper and imperfect record would be made; and requested the court to direct counsel for plaintiff to specially interrogate the plaintiff in respect to such matter as was desired to be elicited from plaintiff, or be shown by plaintiff on his own behalf as evidence in the case; that the judge of said court, in response to said request of counsel for defendant, said that the taking of the witness' testimony in the narrative form would be the best way of getting at what he knew, or could state, concerning the matter at issue; that it would save very much time to proceed in that way, and would perhaps furnish to the jury a more connected statement of the matter to be tried, as it occurred and took place; that counsel for defendant then replied to the court that, there being no particular interrogatories propounded, counsel for defendant could not anticipate what would be said by the witness, and therefore could not know or find out what was objectionable in it until it had already been stated in the hearing and presence of the jury; and that much more time would be consumed if counsel should be required to stop the witness in every sentence in which he might think there was going to be something stated that was immaterial or incompetent as evidence; that the judge of said court did not allow said objection, but did, however, in connection with his statement in response to said objection, suggest to the witness, the said plaintiff, as follows: "You can describe the car in which you were hurt; what (if any) defects there were. You don't have to state every mishap that occurred to the car, but tell the condition of the car on that date;" that for the failure of the court to allow said objection defendant requested that defendant's exception be noted, which said exception was then and there allowed by the court; that thereupon the witness, the said plaintiff, proceeded with his said statement as follows, to wit: "We came in with the car in this shape and it was useless, and Kirk applied to the roadmaster for a new car. Massey was roadmaster. Cannot tell his initials." That at this point of the statement of witness counsel for defendant again objected, making the same objection before stated, and for the same reason as before mentioned; which said objection the court again failed to allow; for which failure to allow said objection counsel for defendant requested the court to note an exception, which exception was then and there allowed by the court; that the court, however, did, in response to the objection of counsel for defendant, suggest to the witness as follows: "Any statement you want to make about anything that happened, or what somebody said, you must not
37 tell, unless you know it yourself; you are supposed to tell things that you saw and know yourself;" that under protest of de-

fendant's counsel the witness, the plaintiff, was allowed to continue his statement in the narrative form, and further stated as follows, to wit: "Kirk went to the station, and this car was not fit to take us out, and he went and applied for a new car. He came back and told us that the roadmaster told him he did not have any at the time to give him, 'but told me,' says Kirk, 'to get this car fixed up and get you fellows to work until such time as he could find one.' So Kirk put the men to work (one of them is here that he put to work) and they fixed it up with some old lumber that remained in the Cheney yard and made a body of it, and got an old wheel and fixed it up in this shape and took us out to work. We worked for a day or two, or some time, and were out two miles from town, and Kirk took a slab alongside the road (a slab to keep lumber on a flat car) and nailed it on the side of the car between the two wheels, ahead of the hind wheel, and nailed through this stick and drove the nail into the car; and by pulling it back you bore on the wheel and stopped the car. When he put it on he showed it to us and said, 'Now, it is not like the last brake; it is good and solid and cannot get away from us.' He said, 'This is a big improvement to the last one.' I did not know any better and believed it. We did not happen to meet any train until this morning when I got hurt. On Monday morning it was customary to run the full length of the section and see if there was anything on the track, and then back to Cheney to work. The section was nine miles. It used to require us to go pretty fast to get back ahead of the train, and sometimes we had cattle to bury and sometimes the track to fix. We always went as fast as we could and got back as fast. The section-house that we had the car in is about one-fourth mile east of the section. Our section was from this car-house. We had to go by the station-house every day to go to work. This morning there was a train, an extra train, came into the station. We waited awhile, thought it was going to pass by. It did not, but stopped at the station. We went to the station, and when we went by Kirk told us to stop, that he wanted to go into the station and see about something. We stopped and went to doing something like shoveling cinders while Kirk crossed over. This train was on the inside of the station from us. He crossed over the train and went as far as the station. I would not swear he went in. After awhile he came back. He said, 'Boys, get on and go to work.' We got on and went to work, and when we got about one and three-quarter miles, the third mile we were
38 nearing a cut where the engine was supposed to whistle. This third mile commenced with that cut, and from there there were cuts and curves and much timber along the line. There were fires along there, which we put out, and lots of smoke, and besides it was misty and foggy. When we got out here one and three-quarter miles, Kirk says, 'Boys, this is too fast running. They told me that this train, at the station, they could see another section between here and Sprague coming behind them, that it was coming at a fast rate to make some point in Montana. It was running extra fast to make this point.' I turned around and the men done the same and tried to stop this car, which I believe was running about

ten miles or so. We tried to stop it, and this man at the brake—it had been so loose, he always had to hold it to keep it there, whether braking the car or not. This man put on the brake and I was on the west end, going out towards the train. The rest were on the east or hind end. There was no one on the front end but me. This man put the brake on and I tried at the pump handles to hold on to stop it, when he said we were going too fast. He said, 'It must be pretty close on us now,' and I tried for awhile to stop it, and in or about the time that he told us the fast train was coming he looked and said, 'Boys, here she is; it is right onto us; get on that brake and get the car off before she comes on us.' So we used the brake and handles, but we saw it was coming to no stop, or not likely to, and I looked to see behind me if this train was near, and at the time I looked it was about one hundred feet, and I believe nearer than that. I saw there was no sign of the car coming to a stop. There were shovels and picks, and sledges and tools of different kinds, and the large jack—all these were piled on the side. They made a practice of putting them on the end of the car there was least on, and I being alone they were on my side, so I was standing in the center in front of this place to jump. I saw the train inside of one hundred feet and no sign of its stopping, and no whistle being made, though she had crossed the crossing. I made an effort to jump to the side of the car, but as the wheel comes over the car, it was not easy to jump across. I tried to jump over the end, and I did not get as far as the rail on the side, as I jumped to the south. The south side of the car hit me on the side of this leg, and it knocked me right into the track ahead of the car. The car was following closely, and I knew that I could not help being catched; as it hit me and knocked me ahead I tried to raise my feet and stop it, but the car caught my foot, and it was coming so fast that it was of no avail. It doubled me over and cramped me up and put my head where my feet were—turned me over. The other leg was caught in the cog of the
39 wheel. I brought the car to a stop and the men jumped off.

I was lying on the gravel. One of the men hollered to me and said, 'Are you hurt?' Kirk said, 'There is no time for this; get hold of the car and get it off the track before the train runs over him.' So they got hold of the hind end, and caught it up, and run around with it, and pulled it down the road-bed after them, and so when my head was towards the rail by their turning the car around the engine went by and blew sand and dirt onto my head. By the time they got around, this cog wheel turned a different way and released my pants, so that I fell out and some of them hollered to this train to stop and come back, but the train ran past quite a ways, and they picked me up and carried me up the track and put me on the train and left me at the station, which was Cheney. Did you have many minutes to wait? They put something under my back. It was not long before the passenger train came in, and they sent me to Missoula." That to the protest and objections made by counsel for the defendant during the time witness was making this statement, which said objections and protest were on the ground that

said witness was testifying to matters that were immaterial and incompetent, as being hearsay, and giving statements made by a third party as to what had been said to him by others, not in the presence or hearing of the witness, the court paid no further attention than to make to the witness the suggestions hereinbefore mentioned, and made no other allowance of said objections; that for the failure of the court to allow said objections, the defendant excepted, and said exception was noted and allowed; that further along, during the examination of plaintiff as a witness on his own behalf, the following question was asked him by counsel for plaintiff (see 10th question, page 5 of testimony): "How did you get support?" In making answer to this question the witness, the plaintiff, proceeded with a statement as follows, to wit: "The Sisters of Charity have told me I could stay here. They applied to the railroad company to see if they would do anything, but they would not. 'You will be a cripple for life,' Dr. Hooton says, 'I will send you to Sprague.' I said, 'What are you going to send me to Sprague for?' He said, 'I am going to send you to Sprague and have Mr. Weymouth apply to the county commissioners to put you on the county.' I said, 'The county-seat is not in Sprague.' He said, 'This was in Cheney.' At that time when he was talking to me the county-seat had been moved to Spokane, and I said, 'The county-seat is in Spokane,' and I said, 'You know the fix I am in, and could not you leave me in Spokane?' He said, 'That is my orders and I must do it;' so I applied to the Sisters of Charity in Missoula to see if they would take me in, because I was sick at the time and could not hold anything on my stomach. The man that took me to the train had to stop several times. The hospital at Missoula was quarantined at that time, so they could not take me in. Hooton said, 'Well, you must go. I cannot keep you any longer. You must get on this night train,' which left at 12 or 1 o'clock. I said, 'Cannot you telegraph to Mr. Weymouth and have him meet me at Spokane as well as Sprague?' Well, he, after awhile, said he would do it, and I asked him if he would not help me on the train. He would not—said the brakeman would attend to me. He said he would telegraph ahead of me to Spokane. The expressman helped me off the cars. I remained at the station and there was no account taken of me that I could see. I got some of the men that were standing there to take me into the station. When I went in the station, the agent said he had something—that there was some one to come along, but had nothing to do for me. He told me that he would send a telegram to Sprague to Weymouth. Whether he did or not I do not know. He would not tell me the answer. He kept me there from 9 or 9.30, and I begged him, as I was sick, to get some one to take me to the hospital." That at this point in the statement of the witness he was interrupted by his counsel with the following question: "You afterwards went to the hospital?" in response to which the witness, the plaintiff, continued his statement as follows, to wit: "And I begged him to do so, and some men took me with the aid of a policeman, and I have been there ever since. The Sisters thought the company would do some-

thing on account of what Hooton told me; they applied to Weymouth, and I think to the agent. Weymouth was general superintendent or something. He had charge of the train hands—superintendent, I believe—used to be paymaster. They sent word to Weymouth and Weymouth gave them no satisfaction, nor the railroad company. Hooton told me when I was leaving, 'I guess I will be down in a few days to see about this thing. Very likely we will be down there;' but he never came, nor any other man."

That during the time said witness was making said statement counsel for defendant called the court's attention to the fact that the cause of action known as the second cause of action had been stricken out by order of the court, and objected to the statement being made by the witness, as not being responsive to any question asked, and was a statement of matters immaterial to any issue involved in the first cause of action, the only one remaining in said cause, and could only be material and competent as applicable to the allegation of the second cause of action, which had been
41 stricken out. The court, in refusing to allow the objection, said in relation to the testimony as follows: "It is proper only as showing his condition and capacity to earn money. He cannot recover damages except for the injuries received on the hand car;" and the court thereupon allowed the witness to proceed with said statement and allowed it to stand as evidence to the jury, to which refusal of the court to allow said objection, the defendant by its counsel then and there excepted, which said exception was then and there by the court allowed.

That further along, during the examination of plaintiff as a witness, the following question was asked him by plaintiff's counsel (see question 9, page 6, of the testimony): "Had Mr. Kirk, the foreman, power to hire and discharge men?" To which question defendant, by its counsel, interposed an objection, on the ground that same was immaterial, irrelevant and incompetent; which said objection was then and there overruled by the court. And the defendant, by its counsel, then and there excepted to the order of the court overruling said objection, which said exception was then and there allowed by the court; that the answer said witness made to the question asked by his counsel was as follows, to wit: "He had hired and let men out during the time I was there. He told us he had orders from the company to do this."

That Joe Carroll having been called and sworn as a witness on behalf of the plaintiff, there was propounded to him by counsel for the plaintiff the following question: "Did Kirk or the telegraph operator or any one tell you you would meet a train on the way, or probably would?" That thereupon defendant, by its counsel, interposed an objection to the question, on the ground that it was immaterial, irrelevant and incompetent; which said objection was then and there overruled by the court, and to said order overruling said objection, defendant, by its counsel, then and there excepted, and said exception was thereupon allowed by the court; that under permission of the court, and over objection and protest of defendant,

plaintiff proceeded to answer said question, and did answer it as follows, to wit: "Not that I know of."

That further along in the examination of said Joe Carroll, as witness on behalf of the plaintiff, counsel for plaintiff propounded to him the following question (see question 7, page 29, of testimony): "Was that a sufficient brake?" To which question defendant, by its counsel, interposed an objection, on the ground that the same was immaterial and irrelevant, for the reason that there was not involved in the pleadings in the action any question of the insufficiency of the brake on the hand car, as the complaint alleged that the said hand car was sufficient for its ordinary uses; which said objection the court then and there overruled; and the defend-
42 ant, by its counsel, then and there excepted to the order of the court overruling said objection, which exception was then and there allowed by the court; that in response to such question, under the permission of the court, over the objection and protest of the defendant, the said witness answered: "It was just as I told you. It was made out of a two-by-four, about so long, put on one side of the car;" and the further question was then asked by counsel for plaintiff (see question 8, page 29, of testimony): "I mean by sufficient, was it a good brake? Would it stop the car?" To which witness replied: "No, sir, it was not a good brake."

That further along, in the course of the examination of the said Joe Carroll as a witness on behalf of the plaintiff, counsel for plaintiff propounded to him the following question (see question No. 10, page 29, of testimony): "If it had been a good brake, could the hand car have been stopped in time for Mr. Charless to get off?" To which question defendant, by its counsel, interposed an objection, on the ground that the same was immaterial, irrelevant and incompetent, which said objection was then and there overruled by the court, and the defendant, by its counsel, then and there excepted to the order of the court overruling said objection, which said exception was then and there allowed by the court, and the said witness was permitted by the court over the objection and protest of defendant, then and there to answer the said question, and did answer it as follows, to wit: "If it had been a good brake, I believe it could have been stopped."

That in addition to the testimony and evidence heretofore in this bill of exceptions referred to, the following testimony and evidence was given on behalf of the plaintiff before the plaintiff rested his case.

HUGH CHARLESS, called on behalf of the plaintiff:

Q. Where do you reside?
A. Sacred Heart hospital, Spokane.
Q. Are you the plaintiff in this case?
A. Yes, sir.
Q. Turn to the jury and tell them the facts in this case, commencing at the time of your employment with the Northern Pacific Railroad Company, and tell them the complete story.

Answers as hereinbefore given. (See pages 2, 3, 4, 5 and 6 of this bill.)

Q. State whether it was foggy or smoky.

A. It was both. We had worked overtime, and worked all night. I did not, but some did, putting out the fires, for several days before.

Q. Do you know what degree curve this was?

A. I do not know.

43 Q. Was the curve sufficient to obstruct the approach of the train?

A. Yes, sir, and the cut was between us and the curve, and there was timber, and it was smoky.

Q. Was any notice given by the engineer of the approach of the train?

A. I never heard any, and there was a crossing right there where he was, and I never heard the whistle.

Q. Could you have heard the whistle if there had been any?

A. I could not help it.

Q. Describe the way that brake was made and attached to the car and how used.

A. As well as I can tell, it was a piece of slab, and Kirk picked it up. As well as I can guess, it was two feet six inches long, and he nailed it between the front wheel and the hind wheel on the side of the car, about six inches or five inches ahead of the wheel. The wide side of the stick was to the side of the car with a nail drove through it, and the narrow side was to take up and hold by, and by holding down with your hand, that braked it. One nail drove through held it, and you pulled it back to the wheel. It would come down on this wheel.

Q. How wide was the surface of the brake that rubbed on the wheel?

A. I could not say. The side towards the car, to the best of my knowledge, was about three inches; but the side that rubbed on the wheel I do not think it was two inches.

Q. How wide was the wheel?

A. The wheel, I think, was about three or four inches—three inches, I believe.

Q. Were all the wheels of the car of the same size?

A. I believe they were.

Q. Were they mates?

A. Kirk, at the time this wheel broke, and Massey told him to fix up the car—I do not know whether mates or not. It was an old wheel, and to make it fit on the axle he had to take it to a blacksmith and get the blacksmith to do something to it.

Q. Did the cogs in the brake work properly?

(Objection to the leading question.)

Q. How did the cogs on the brake work?

A. I could not very well tell. There is a cog wheel in the bottom, and there is another that we worked, and I believe, between them we worked, but I cannot explain.

Q. State as to what state of repair.

A. They were not in very good repair, because Kirk himself and we many times had to repair them in some way and put in nails to hold them together. There was a nail in some place connecting with the cog wheel, which used to fall out, and we used to get down and fix this to get in.

Q. State whether the cogs ever slipped. This falling out of the nail used to stop the car?

A. No.

Q. Did you see Mr. Kirk put this brake on?

A. We had been working at a distance. I believe it was in the forenoon he put it on, and we had been working at a distance putting in ties. We saw Kirk working in the car and he came up afterwards and said, "Boys, I have been putting on a brake." He said, "This cannot fly away from us." He brought us back and showed us and told us that was far ahead of the other. We did not need to be afraid of a train catching us.

Q. What rate was the freight train running towards you?

A. As I had been knocked down and did not have much view when it passed, I cannot say, but it was running so fast, I would say it was running pretty close to thirty miles. At the time it passed, as I was really under the car I could not say, but it was running so fast I could say it was pretty close to thirty miles.

Q. Did you hear any conversation between the engineer of the approaching train and Mr. Kirk after you were hurt?

A. I did not. If they had I would not notice it, my pain was so great.

Q. Was there a telegraph operator at Cheney?

A. Yes, sir.

Q. What was the habit of the section gang in going out, if any, as to finding out about approaching train?

(Objected to by Mr. Mitchell; objection sustained.)

Q. How much had you earned before you were under the employ of the Northern Pacific at any time?

(Objection; overruled.)

A. Before I came West I earned $2 per day in the coal mines in Scranton; I never worked for $1.60 until I worked on that section. I worked for $2 to $2.50. $1.60 is the smallest I ever worked for.

Q. How old are you?

A. Born in 1861.

Q. What was the condition of your health before your injury?

A. I never troubled a doctor or a hospital since I was a boy.

Q. Were you able to work every day?

A. Yes, sir; the foreman can say that I worked every day from the time that I hired until I was hurt—never lost a working day.

45 Q. Have you been able to earn any money since the accident?

A. No, sir; not able to help myself without assistance.
Q. How did you get support?

Answer as hereinbefore set forth (see pages 6 and 7 of this bill).

the station. When I went in the station, the agent said he had something; that there was some one to come along, but had nothing to do for me. He told me that he would send a telegram to Sprague, to Weymouth. Whether he did or not, I do not know. He would not tell me the answer. He kept me there from 9 until 9.30, and I begged him, as I was sick, to get some one to take me to the hospital.

Q. You afterwards went to the hospital?

A. I begged him to do so, and some men took me, with the aid of a policeman, and I have been there ever since. The Sisters thought the company would do something on account of what Hooton told me. They applied to Weymouth, and, I think, to the agent. Weymouth was general superintendent or something. He had charge of the train hands—superintendent, I believe—used to be paymaster. They sent word to Weymouth and Weymouth gave them no satisfaction, nor the railroad company. Hooton told me when I was leaving, "I guess I will be down in a few days to see about this thing; very likely we will be down there;" but he never came, nor any other man.

Q. Are you unable to walk?

A. Any man that sees my legs could see. I have never been able to stand up, or move them. I cannot feel a match burning them.

Mr. MITCHELL: I call the court's attention to the fact that the cause of action known as the second cause was stricken out.

The COURT: It is proper only as showing his condition and capacity to earn money. He cannot recover damages except for the injuries received on the hand car.

Q. State to the jury what part of your body is injured.

A. The doctors tell me that it is the spine. It is right up in the small of my back. There is a large bone knocked out, and the spinal cord is the cause of the paralysis which I have.

Q. Are you unable to know any of the ordinary calls of nature?

A. No, sir, I have got no use at all. I have even now to use a conveyance for that purpose.

Q. You can move yourself about with your hands?

A. I can move my arms. I have no use of my legs.

Q. Are your arms stout?

A. Yes, but the effects to my bowels, by being irregular, keep me sick most of the time.

46 Q. Can you tell when your bowels move?

A. No, sir.

Q. What effect has the injury upon your general health?

A. It is affecting my health all the time, because I am half dead.

Q. Had Mr. Kirk, the foreman, power to hire and discharge men?

(Objected to; objection overruled; exception allowed.)

A. He had hired and let men out during the time I was there. He told us he had orders from the company to do this.

Q. Did Kirk ever pay off any of the men?

A. Well he did not pay money, but he had the power to give a time-check.

Q. Did he direct what part of the road should be repaired?

(Objected to, and objection sustained.)

Q. Under whose direction did you work?

A. Under Mr. Kirk's.

Q. What did you do by his direction?

A. Put in ties sometimes, sometimes helped raise the track, sometimes pulled weeds and shoveled cinders—anything he thought needful.

Q. Was there anybody else that directed besides Kirk?

A. No, sir; he was the foreman.

Q. Who had the direction and control of the hand car, saying when it should run and where?

A. Kirk had; he ordered us to go ahead any time he liked.

Cross-examination.

Mr. MITCHELL:

Q. When do you say you were first employed there?

A. I do not remember; to the best of my memory it was the 13th May, 1886.

Q. When did this accident occur?

A. The 28th August, as well as I remember.

Q. You had worked there all summer, without the loss of a day?

A. Without the loss of a working day. There was a quarter day, or something, but have no knowledge of losing a whole day.

Q. You were perfectly familiar with the section? How long was it?

A. When I was there to work, it went to the next station west of Cheney, but they took some off, and I think it was nine miles at the time I got hurt.

Q. Every day that you worked, you went out on the hand car?

A. Yes, sir.

47 Q. You were familiar with the hand car, and appliances and tools?

A. I had the privilege to all these things, but I never did anything in regard to braking the car.

Q. You handled the lever?

A. Yes, sir; I pumped.

Q. You knew what grades there were there?

A. No, sir; I did not take any notice of the grades. I did know some places there were grades, but I cannot give an account of the grades all over the section.

Q. You knew the cuts and curves, where they were?

A. Yes, sir.

Q. You got so familiar with that section that you could tell where a certain cut was located, and what they called it?

A. I never knew the name of any cut.

Q. You knew what distance they were from Cheney, and what distance from the other end?

A. Did not. I knew cuts that would be on certain miles, on the third and fourth mile, but the distance from Cheney I did not know. Two miles from Cheney there was cuts, on the third mile some a quarter and some a half mile, but I did not know the exact distance. On some miles there were a good many, but I do not know the distance between.

Q. There were mile posts there?

A. Yes, sir.

Q. Some bridges on that section?

A. Yes, sir; ahead a good many miles.

Q. These bridges had boards on, giving the number of the bridge?

A. I never remember seeing it. I have no knowledge of it. They were not very big bridges. There was one running over a little creek. I never remember seeing boards giving the names of them.

Q. You were familiar with this particular curve and crossing that you were approaching?

A. I knew the curve was ahead, but I knew nothing of the train.

Q. You knew how far you were from the curve?

A. No, sir; my back was that way, and I did not see ahead of me.

Q. You could not tell from your experience and familiarity with that section how near to that curve?

48 A. No, sir; at the time Kirk mentioned about the train, before I turned around, I did not know what distance I was from the cut.

Q. How do you know there was a road crossing?

A. There was a road crossing in or about the commencement of the second or third mile; a plank crossing where a wagon road crosses.

Q. You know pretty well the depth of this cut?

A. I did not know that—no, sir.

Q. Did not know that curve as compared to the others?

A. I would guess the cut was, maybe, fifteen or twenty feet high. I do not know the exact measurements.

Q. You think as much as five feet?

A. Yes; more than that. Higher than any man could reach with quite a good-sized pole to the top.

Q. Is there any cut within four miles west of Cheney that is as deep as four feet?

A. This cut is only two miles from Cheney, and it is about twenty feet.

Q. Kirk had not been on that section as long as you had?

A. He had not been on that section, but on that road for years, I heard.

A. He had hired and let men out during the time I was there. He told us he had orders from the company to do this.

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Q. Kirk had not been on that section as long as you had?

A. He had not been on that section, but on that road for years, I heard.

Q. You do not know whether he had been over that section before he was employed?

A. No, sir; I never worked in that part of the country before.

Q. Tell me some particulars of your railroad work.

A. I done rock-work; I done right-of-way work—general right-of-way work.

Q. That was clearing and grubbing?

A. No, not grubbing; I chopped logs.

Q. What character of rock-work?

A. Drilling.

Q. Where?

A. On the Canadian Pacific.

Q. How long did you work in that capacity?

A. From September, 1884, until over a year.

Q. What other work before you came to this section?

A. That is about all the railroad work I did do. I worked on a railroad back East—I was younger then—worked about three years East.

Q. What character of work?

A. Sometimes packing water and such like; drove teams.

Q. That was during the construction of the railroad?

49 A. Yes, sir.

Q. In railroading on the Canadian Pacific you passed to and from your work on a hand car?

A. No, sir; I walked to the camp.

Q. In going out from Cheney you knew whether it was down or up, didn't you, going west?

A. I could not tell exactly. I had nothing to do with the rails, except fixing up. I never worked on a section of the kind, so I did not know.

Q. You could not state whether it was up or down grade you were on?

A. I could not exactly state. I would say, to the best of my knowledge that we were on a downgrade.

Q. This cut and curve you were coming to was the first from Cheney going west?

A. It was the first big curve; there were some little ones.

Q. You think that hand car was running at a speed of about ten miles an hour?

A. I know sometimes there was a man on the car that used to say what time, and I know Kirk himself said to us some mornings, "I am not much afraid of a train catching up to us, because it is my belief we are running thirteen miles an hour." I believe we were running ten. Kirk told us more than once that it was his belief we were running thirteen.

Q. You had frequently run that fast?

A. We used to run fast every Monday morning. We tried to get to the end in case there was any work to do, and get back before the passenger train could catch us.

Q. All this time, you were running these cars with this class of brakes?

A. No, sir; I never run on a car of that kind except that. The one car is all I know about.

Q. You used that same car during all the time you were on that section?

A. Yes, sir.

Q. Did you use any other?

A. No, sir.

Q. You run at that rate of speed very frequently?

A. That was Kirk's opinion, that we were running 13 miles an hour.

Q. You never made any objections or complaints about the rapid rate of speed?

50 A. No, sir; it was Kirk's orders, or it was his wishes to get there as fast as we could get over the road, and have us to work. He did not want us to put in time on the road.

Q. He never said anything to you about running it fast?

A. He told us more than once to get around and get that thing on a little faster. So did Selt (?)

Q. You frequently run it fast when Kirk did not say anything about it?

A. When we run it as fast as we could he did not say anything, but if we did not, he would tell us to do it.

Q. You never objected to that, did you?

A. I could not, it was not my business; if I objected I could quit the job.

Q. You never objected to these appliances, nor the condition of the car?

A. No, sir; all I did was to do what I was told. I worked the best I could. As far as the car was concerned, I did not claim to have knowed anything, because it was my opinion when we put on the brake that it was first class, though I have been told since that it was not.

Q. How does it come that you are able to tell all about this brake and how it was located and how put on?

A. I had been watching it every day. We were all standing on the car and could not help seeing it.

Q. You had used that brake yourself?

A. No, sir; I made no practice of using it.

Q. You did use it, didn't you?

A. No, sir.

Q. I understood you to say Mr. Kirk seldom handled the brake himself?

A. I do not remember that he ever did.

Q. That was just as liable to be handled by one man as another?

A. Yes, whoever was standing there to do it. I did not reckon myself fit to do it; it was always left to some other man.

Q. You thought you had more experience in handling the lever than in handling the brake? Was there not some manner of regulating the speed?

A. I do not know, except to work hard or easy.

Q. Did you ever undertake to increase speed going up grade?

A. Yes, sir; work all I could to increase it.

Q. Going down grade, how?

A. We used to work it all we could. There was some
51 bridges low down, in a place where there was a grade; we could work her fast to get up, and going down keep going as fast as it would.

Q. You never made any objection to going at a rapid rate through cuts and around curves?

A. Never made objection to anything, because my objection would not be acknowledged.

Q. You do not know anything about that unless you made objection?

A. I could not say. It was not my business to object; it was my business to obey orders.

Q. You have no means of knowing what would have happened if you had made objection or complaint?

A. I cannot tell anything about that. I never objected to anything. I did what I could.

Q. You had frequently gone out on the car, standing in this same position that you were this morning, and with tools, appliances and all sorts of iron and wooden matter also piled up on the car?

A. Yes, sir; but never been in the same position that I was that day. I never rode on the front end before. I was always standing in the center on the hind end; but this morning these four other men all jumped on the hind end, so that I went on the front.

Q. You say that happened only once between May and August?

A. I always had been on the tail end; yes, sir.

Q. You had never stood on that car handling the lever, with your back in the direction in which the car was going?

A. Never going out before, but of course sometimes, when running over the track, there used to come specials.

Q. You had to keep a lookout for these specials?

A. We did not know anything about specials.

Q. Nobody ever told you about specials?

A. No, sir.

Q. Never got information from any one about specials except when they happened to come on you?

A. We got no information. If the foreman took care, that was all.

Q. The foreman never told you about specials, did he?

A. I believe he had, one morning a long time before that, and took the car off the track until a train went by.

Q. You had met them when he did not tell you about them?

A. I do not remember that we did ever meet specials.

Q. Did you not meet a special every day?

52 A. No, I think not; maybe once a week.

Q. They would frequently come along when you were running on the road?

A. No, sir; we never met a special when on the track.

Q. How does it happen that you had to use the brake so?

A. That morning we went out, there was a horse on the track and

we had to bury this horse, and it took us a long time to bury him; we had to run over the section, and when we were coming back we were pretty near Cheney, and as it was becoming the passenger-train time, the time was short and she was coming behind us.

Q. Is it not a fact that the passenger train arrived at Cheney shortly after you arrived there?

A. Yes, sir; shortly after.

Q. Is it not a fact that when you went out you were expecting the passenger train?

A. We knew it was to come.

Q. You did not know exactly where you would meet it?

A. No, sir; not exactly. It was not due at the time we left Cheney; it was not for a long time after we left.

Q. You knew you would meet it?

A. No; we used to hurry to get over the section and back before it came.

Q. You could not tell whether you would meet it before you got over or not?

A. We could, by knowing the time of the train. Sometimes the passenger did not come to town at the regular time.

Q. If it was late, you would not know anything about it?

A. No, sir; we knew nothing about the time of trains; we had the privilege of knowing the time of regular trains, but knew nothing about accidents. They might not come until the next day.

Q. You had no means of knowing if a train had been delayed after you left Cheney?

A. Not while on the road, but we had an idea what time the passenger train should come along.

Q. You were liable to have to get your car off the track at any time for a train?

A. We did not know of being liable, because we did not know of any train except regular trains, and our going out in the morning is ahead of the regular train; the first regular train was after 9 o'clock.

Q. You left Cheney at 8.30?

A. I do not know; we delayed some time in Cheney.

53 Q. What time usually?

A. At 7 o'clock we generally took out the car, but we used to do some work around the station.

Q. How long were you delayed that morning?

A. I could not tell; I did not keep a timepiece for that.

Q. Was it that morning that Kirk fixed the brake?

A. No, sir; it was before that.

Q. How long?

A. I could not say.

Q. About how long?

A. I would say he started some time after July 4th. It might be a week or a couple of weeks before he put on the brake.

Q. If he put it on two weeks before, you were running with that brake in that condition?

A. From the time he put it on we were running with it in that

condition, but never had met with a train in that time until this one.

Q. Is it not a fact it is down grade from Cheney west?

A. I could not tell.

Q. Is it not a fact that it is down grade at this cut?

A. I think there was a little cut on the second mile, between Cheney and the big cut; and I believe that it is a little one and a big one there. I think it is down grade.

Q. Knowing you were going down grade and approaching a curve and cut, you did not take any measures to diminish the speed of the car?

A. We took measures as soon as Kirk gave us to know that a train was coming.

Q. You knew you were approaching a road crossing?

A. Yes, sir.

Q. Did not undertake to diminish the speed at the road crossing?

A. Yes, sir; we crossed another one, too, about the same distance out of Cheney.

Q. Did you know what point you were going to work at?

A. No, sir; we never knew in the morning, or even in the middle of the day, because we started from one place to another.

Q. You were liable to be moved over the track—any portion of the track—at any time of the day?

A. Yes, at any time Kirk thought fit.

Q. Without going into the station at Cheney?

A. Wherever he liked to take us.

Q. You were seldom taken into the station; you had dinner along with you?

54 A. Yes, sir.

Q. Were you not liable to meet trains?

A. We could not account for that; we had to go where he wanted us.

Q. You knew you might have to take that hand car off the track anywhere on that section to meet a train?

A. If we did meet a train, we knew it was our business to take it off, but whether we would meet one or not we did not know.

Q. About what time did you say Kirk became section foreman?

A. He was from the 4th of July in Cheney, but he was sick and the other foreman was gone, and whether the company or Kirk himself paid the man out of his own pocket I do not know, but he got another man to act as foreman for a week or so, until he was fit to go to work.

Q. How long elapsed between the time the old foreman left and this man Kirk came?

A. Only a day, I think.

Q. You laid off work during that time?

A. No, sir.

Q. You went right along with your work?

A. There was one man there that kept account of it. It was almost no time before the other man came; Kirk was there too, but he claimed to be sick.

Q. Whatever time you did work, you worked without a section foreman?

A. I do not remember: I think there was a half day or something he staid there until Kirk thought himself well.

Q. The men that were there at the time of your accident were not there in May?

A. There was one of them; there was two there, but one was not out to work; the day I got hurt there was only one man there that was there before May.

Q. How many men on the car?

A. Five; Kirk, Parsons, Carroll, myself, and another man.

Q. You did not need all these men to run the car?

A. It needed them all. They all could work at it, but of course when we did not have the men, what were there had to do it.

Q. One man at the brake and two at the lever could work that car?

A. Not as fast as four or five.

Q. You were about the oldest man on that section in service?

A. With the exception of one.

55 Q. What was that one doing?

A. Working with us on the lever.

Q. You had jumped off that car before frequently?

A. I never had occasion to jump off in a hurry like that.

Q. While the car was running?

A. Well, we did at the time of the mishap to the other brake, but I was on the tail end then, so that the car ran away. That was near enough, but not like this time.

Q. You turned around to look at the train before you jumped?

A. I did not turn around, but I turned my head; I did not turn my feet.

Q. You were still handling the lever?

A. At the time I turned around I was trying to stop it, because it was just then he hollered and I held on, but when I saw it was so near I let go the lever and turned square around and made the best I could to jump to the south side.

Q. Did you have to turn square around to jump off the side?

A. Yes, sir; I could not jump off backwards. These tools and big jack were piled up on the side. I was not standing on the outside, but in the centre.

Q. Did you look to the other side before leaping?

A. No, I don't believe I said I looked to the north side; I looked towards the coming of the train.

Q. Before you jumped, which way did you look?

A. To the south, where I jumped.

Q. Did you look to the side of the car instead of to the engine?

A. I was standing in the centre and could not very well get over the tools.

Q. Did you look either side of the car to see if you could jump?

A. I did not look at all; the train was upon me.

Q. Make any effort or attempt?

A. I did not have a second's notice to make an attempt anywhere; I made one attempt and that was a short one.

Q. Now, this train, running at thirty miles an hour and only 100 feet from you, did not get to the place where your car was when you jumped, until after the car had been taken off, and you had been removed from the car.

A. The train, at the time I looked around, I considered to be 100 feet or less, and when I jumped to the south side, the car hit me on the leg and knocked me in front; it might have run my length and doubled and rolled me up.

56 Q. Before you were taken out from under the car, there was a question asked whether you were hurt or not.

A. At the time they were running around with the end of the car to pull it off, one of the men said, "Are you hurt?"

Q. Didn't he ask you before Kirk said to pull it off?

A. Kirk said there was not time. Get the car off before the train runs over him. They reversed it with me under, and by reversing it my pants and leg got released and I fell out.

Q. Then you think the train did not make this 100 feet while you were engaged in this work?

A. I could not tell, but at the time they pulled the car off the track with me under it, the train just run by my head. It was about all they could do to get me off.

Q. The engineer did not slow down the train?

A. I could not say; I was under the car. He could not have slowed down, because he run away ahead. They took me a long ways to meet the train. He could not have slowed down until he ran past me.

Q. Were the fires burning right opposite?

A. They were burning west of us.

Q. Right close to the track?

A. Some of them had been in the track burning out culverts; some of the men sat up many nights, or some nights, and some parts of the days working to put the fires out, packing water, etc. Even wheat and fences burned down.

Q. Were they burning at this time?

A. Yes, sir; I do not know what they were all; but there was fire there.

Q. How long elapsed from the time Kirk gave you notice until you jumped?

A. I could not tell you; I did not know what this information was, but I often thought afterwards that it was by his running this third mile that that is what made him afraid. That is my opinion. He said, "I am afraid we are running too fast; they told me at the station that the trainmen saw a section coming after them," and he told us that they told him that this train was running at extra speed.

(Question repeated.)

A. The time, as near as I could—I actually cannot fix the time, because the thing was in so much hurry; it was a short time.

Q. As much as two minutes?

A. I would not think it could be two minutes.

57 Q. From the time Mr. Kirk notified you until you got off the car?

A. I would not think it could be.

Q. More than one minute?

A. I do not think it could be.

Q. If this train was 1,500 feet distant at the time Mr. Kirk notified you, and running 30 miles an hour, you mean to say it was only 100 feet from you when you looked around?

A. He told us he was afraid it was running too fast. We tried to top it some little time, when he hollered, "Here she is onto us, boys; put on that brake and try to get off the track." Then I tried my best for some little time, and so did the rest, to stop, but there was no sign of coming to a stop; he spoke so fast that I looked to see how near it was.

Q. Mr. Kirk then notified you you were running too fast before he notified you the train was in sight?

A. He notified us just in about time enough to notify us.

Q. You were not making any effort to stop?

A. Yes, sir; the best we could.

Q. What time elapsed in making efforts?

A. I cannot tell you.

Q. The men who worked on the section had work to do about the station in the morning before going out to work on the road, and in the evening after coming in?

A. If Kirk ordered to do it we did.

Q. When you went out in the morning you brought this hand car out of the car-house, didn't you?

A. Yes, sir.

Q. You brought it out on a wooden tramway?

A. I did not see any tramway.

Q. How did you get it on the track?

A. There was a board affair, like a railroad crossing; I believe there were rails inside the car-house, but not out.

Q. How did you get it on the track?

A. Pulled it along or carried it.

Q. When you got it out, you lifted it on the track?

A. We would pull it on, one end at a time, or carry it on.

Q. On the section the same way?

A. Yes, sir; except that if there was six or seven men we could lift it up.

Q. You were accustomed to doing that every morning and evening?

58 A. Yes, sir.

Q. Now, between the time that Kirk had fixed it, two weeks before this occurrence, and the time of this accident, you have been helping to put this car off and on?

A. Yes, sir; at everything that was my business—everything that I was required to help at.

Q. You also helped at putting the sledges and pieces of iron and wood on the car, and the tools?

A. Yes, sir.

Q. The condition of the brake that morning was the same as it had been?

A. Yes, sir; as far as I knew.

Q. You had worked it safely during these weeks?

A. I have told you I never worked it.

Q. You worked the car safely and without trouble?

A. I worked the car, but we never had a chance of anything of this kind in meeting a train.

Q. Did not Mr. Weymouth, superintendent of Sprague, pay you your checks?

A. Well, sir, I would not know the man, but I have been told that Mr. Weymouth was the man that paid us.

Q. The superintendent paid you?

A. I do not know him. The man that paid us they told me he was superintendent.

Q. It was not Mr. Kirk?

A. No, sir.

Q. You had on that section just the same work as the other men, in relation both to the road and track?

A. Yes, sir—whatever I would be set at.

Q. You helped repair this car?

A. No, sir.

Q. You never heard the roadmaster direct the section foreman anything about the sufficiency of that car?

A. No, sir; never heard Kirk and the roadmaster talk; I seen them standing together, but did not know what they were saying, except when Kirk would tell us.

Q. How do you know that this block was just two inches?

A. I did not say it was two inches—as near as I can guess it was.

Q. Did you ever examine it?

A. No, sir; never had any occasion to measure it.

Q. How did you know the wheel was three inches?

A. I did not say so; I said it was, to the best of my knowledge.

59 Q. You saw the other cars on this section?

A. There was no cars on this section but this one.

Q. Had you been over other portions of the road during the time you were employed?

A. No, sir.

Q. Remained right there all the time?

A. Yes, sir.

Q. You say you earned less in the work on this road by 40 cents than you earned in Pennsylvania in the mines?

A. I say I never worked as low as $1.60 until then.

Q. Always got better wages in the East than on the coast?

A. No, I got $2 in the East, and on the coast I worked for $2.50 and $2.25 at the smallest; that was on the Canadian Pacific.

Q. Do you mean to say you only got $1.60 on the section?

A. That is all I have any knowledge of.

Q. You worked there for $1.60 on the section for a whole summer from May to August, when you had been getting $2.50 on the coast?

A. I had got this before I went to work there, but I have never worked any since.

Q. The section foreman never paid you?

A. No, sir.

Q. That is all.

(Redirect examination waived.)

V. M. MASSEY, called by plaintiff, testified as follows:

Q. State your employment in August, 1886.

A. Roadmaster for the Northern Pacific.

Q. Do you recollect the accident to this man?

A. Yes, sir.

Q. Were you acquainted with the plaintiff, Hugh Charless?

A. I was not.

Q. Did you know him by sight?

A. No, sir.

Q. Did you see him.

A. I saw them about him on the train.

Q. Were you there?

A. Yes, sir.

Q. Where were you?

A. I was on the passenger going out of Sprague?

Q. Are you acquainted with William Kirk?

A. Yes, sir.

Q. What was his occupation?

60 A. Section foreman on the Northern Pacific.

Q. What were the duties of Kirk as section foreman?

A. There were several; to keep the track in passible condition for trains; to see that trains were not delayed by negligence on his part.

Q. How many men under him?

A. I do not remember at that time—possibly, four, five or six. Some months the number was cut down, and again some put on, according to the work.

Q. Was it your business to see to the appliances, cars, spikes and appurtenances which they used at that time?

A. Yes, it was my business to see that they had the necessary tools to work with.

Q. Was this car furnished under your administration?

A. I do not remember whether it was, or before I went there.

Q. Did you ever see them on the road with this hand car?

A. Certainly.

Q. Did Kirk speak to you at any time about the hand car?

A. I do not remember of it.

Q. He may have?

A. Possibly might have.

Q. Did you furnish him the hand car?
A. I do not remember it—I might have.
Q. Do you remember his telling you about any defect?
A. No, sir.
Q. Anything about the brake or wheel?
A. No, sir.
Q. He may have asked you about them?
A. Possibly might have.
Q. Who was superintendent of the division?
A. F. P. Weymouth.
Q. Was there a telegraph operator at Cheney?
A. I think so.
Q. What is the duty of the telegraph operator?

(Objection taken and sustained. Exception allowed.)

Q. You say you had seen this hand car?
A. I had seen the car on that section. There was only one.
Q. Then you saw that hand car?
A. Certainly.
Q. How long were you roadmaster?
A. About two or three years.

61 Cross-examination.

Mr. MITCHELL:

Q. What kind of a hand car was it?
A. The ordinary style; same as we used at that time.
Q. Did it differ in any way from others on the road?
A. Not to my knowledge.
Q. How was the brake arranged on that class of hand car?
A. I could not tell, only that I think it was arranged a great deal as the others. The present brake on a hand car comes from the shops the same as this, with a foot rest to put the foot on. Lots take them off and put a lever in, to get a heavier purchase to make a more rapid stop. Whether they had it or not I do not know.
Q. You say the brake at the end is sometimes removed, and the other substituted for what?
A. For more rapid stop; heavier purchase on the wheels—four-foot lever instead of one foot.
Q. What is the comparative advantage of the one on the side with a bar and *and* one with a foot?
A. I do not know except the more rapid stopping.
Q. Where they had the brake on the side, how did they arrange about the handle?
A. The handle of the brake stood upright, and a man stood between that upright part of the car and the brake; same as the reverse lever of an engine.
Q. What was usually used on those cars in the way of a handle?
A. Generally they took a 2 x 4 and whittled it down with a plane; the bottom part was 2 x 4 or 2 x 3.
Q. What amount of experience did it take to handle the brake?

A. Anybody could handle it; it was not run by steam—it was purely muscle.

Q. You never knew of the car being out of order?

A. Not that I remember now.

Q. If any reports were made to you, would you have remembered it?

A. It is hard to say as to that. I probably would. There were reports from other sections. Lots of them did it so that they could send their cars in so that they would not have to run the car over their section. I examined them first; I do not remember examining this one.

Q. Did you ever give directions as to what kind of brake to use there?

A. No, sir.

62 Q. Was this car any different as to the brake they used at the time of the accident than it had been, so far as you know?

A. No, sir.

Q. Where were these sticks obtained which they used for brakes?

A. I do not know.

Q. State whether or not the stakes as brakes were more frequently used than the foot brake.

A. Well, only on curvy sections.

Q. How about this section?

A. It is not very curvy; the west end is bad, but the end next Cheney has only one curve—about a 4-degree curve. Anybody traveling over the road knows it is not curvy.

Q. What are the cuts out of Cheney?

A. Light.

Q. Where was the heaviest cut?

(Objection taken and sustained. Exception allowed.)

Q. You had been over that section frequently during the time between May and August, 1886?

A. Yes sir.

Q. When the section men went over the section, what was the practice about any one particular man doing any particular part of the work?

(Objection taken and overruled.)

A. Not outside of the section foreman. He had no particular work but to take charge of the men. No man had any particular work designated.

Q. Was any one design-ed to handle the brake?

A. Not to my knowledge or by my orders; they all did practically the same work—supposed to; there was no distinction—should not have been, that I know of.

Q. They were liable to pass with their car over any portion of the section during any portion of the day?

A. Yes, sir.

(Objection taken and overruled. Exception allowed.)

Q. Trains were moving over that section at all times of the day?

A. Yes, sir; any time that they set for it; and they had special trains right along.

Q. At all seasons of the year?

A. Yes, sir; called extras—supposed to be extras.

Q. This was the only hand car you had on that section?

A. Yes, sir.

63 Q. What would you say of that hand car as in comparison with hand cars in use generally along the road—as to character and style?

A. That I cannot very well say, because I do not remember just what condition the hand car was in, but if it had been in very bad condition it would have been in the shops.

Q. It never had gone to the shops?

A. Possibly it had—possible not.

Q. How far did the roadmaster's division extend?

A. From Sprague to Heron, Montana.

Q. How did it compare with other grades on that division?

(Objection taken and sustained.)

Q. In what condition, as to being good or otherwise, was this car when you saw it?

A. If the car had been bad, I would have known it; if not bad, I didn't inquire into it. If the car had been out of order I should have known it. I did not know that it was.

Q. What was the condition of the appliances in regard to the car when you furnished it for that section?

A. It was good.

Q. How was it after being provided with all appliances necessary for operation?

A. All right.

Q. How as to the condition of these appliances?

A. They were all on it when I shipped it, to the best of my knowledge. It was there when last I knew, but it is a hard question to answer just as to the condition of the car, because I did not know it thoroughly. I can state that if in bad shape I would have known it and had it repaired; it might have gone out that morning and got damaged and I would not have known it.

Q. How often were you along there?

A. Every two or three days—probably every day—not longer than three days.

Q. Never received any complaint about the condition of the car?

A. Not to my knowledge.

Q. Do you remember stating to Mr. Kirk, after inspection of the car and after a conversation with him at Cheney that now the car was all right and now there would be no trouble about it?

(Objection taken and sustained.)

64 Redirect examination:

Q. The brakes that are put on in the shops, made of iron, contrived so as to press against the wheel with the foot—how are they constructed, and how applied or attached to the car?

A. Some with iron and some with rubber appliances for pressure against the wheel. When they come from the shops they are iron or rubber; also when they come into the shops with this rubber, like this (indicating) and it comes out the same way, unless broken off entirely.

Q. Might they not put these brakes on both sides?

A. Certainly; they are always—but handled with one brake.

Q. They are on both wheels, on each side?

A. Sometimes; on the new style they are on both wheels.

Q. Were those brakes in use at that time?

A. No, sir.

Q. You knew they had these brakes at that time?

A. Yes, on a different patent.

Mr. MITCHELL:

Q. You did not have any of those cars of the other patent?

A. Might have had one or two—don't think we had; we got them later or about that time; if we did we had one or two; we used them on the east end, where there were heavier grades or more snow.

Q. Whose preference was it as to putting this stick or stake in?

A. The section men—any man that worked on a section was always in favor of it because it was an improvement on a curve or heavy grade and where trains were going fast.

Judge PRATHER:

Q. How long had these new iron-wheel brakes been used on the east end?

A. I could not say; I do not remember.

Q. They had been used?

A. I think one or two cars at Missoula in the bridge department.

Q. With these appliances they could stop a car quicker?

A. Not any quicker than they could with a hand brake. This lever was attached at the bottom of the hand car; it did not press on the side of the wheel, but pressed on the portion of the wheel that turns on the rail, and when you press it comes against the wheel right in front, about half way between the top of the rail and the top of the wheel.

Q. If the bar was fixed on the side of the car it would not give as great purchase as if attached on the side and pressed this way?

65 A. It would have been in the way of handling the car; the handles of the car stick over, and a man bending over the handles would strike him—consequently they could not use it that way.

Q. If it had been attached that way, it would not have been attached as you suppose it was attached?

A. No, sir.
Q. Are you employed by the railroad company?
A. No, sir.
Q. Have you any contract with the Northern Pacific?
A. Not yet; I have got some on hand.
Q. How long since you have been in the employ of the company?
A. Since last fall. Was not employed by them except indirectly.
Q. How long since you were roadmaster?
A. About three years.

JOE CARROLL, called for plaintiff:

Q. State your name.
A. Joe Carroll.
Q. Where do you live?
A. Twelve miles north of Sprague.
Q. How long have you lived there?
A. Seven years.
Q. Where were you in August, 1886?
A. I was at Cheney.
Q. What were you engaged in at that time?
A. I was working on the section.
Q. What section?
A. West end of section west from Cheney.
Q. On what road?
A. Northern Pacific.
Q. Who was foreman?
A. Mr. W. C. Kirk.
Q. Were you in his gang?
A. Yes, sir.
Q. Employed by him?
A. Yes, sir.
Q. Under him.
A. Yes, sir.
Q. Who was roadmaster?
A. Mr Massey.
Q. Are you acquainted with the plaintiff, Hugh Charless?
A. I seen him; I never saw him until he commenced on the section. I worked on the same section.
66 Q. At the same time?
A. Yes.
Q. Were you there at the time of this accident?
A. Yes, sir.
Q. When you started out on the section from Cheney did you know where to meet any trains?
A. Not that I know of.
Q. Did Kirk or the telegraph operator or any one tell you you would meet a train on the way, or probably would?

(Objection taken; overruled; exception allowed.)

A. Not that I know of.

Q. If they had informed you would you have known it?
A. I think so.
Q. Did you meet any trains?
A. There was a train on the track at the station as we went out.
Q. You did not meet that, did you?
A. No, it was in before we started.
Q. Was there any other train on the section after you started out?
A. There was a train coming against us after we got out two miles.
Q. When was the first knowledge that you had of the approach of this train?
A. I believe it was smoky that day. We had been looking out for a train but could not see far, and then some one said, "There is a train coming;" then I tried to hold on to the handles as much as I could, and somebody put the brake on, and Charless, who had been holding back on the handle to stop the car, then turned and looked at the train, and then turned and got off and fell.
Q. How did he get off?
A. I seen him turn and step off; he fell.
Q. Did he fall off the car or after he got off?
A. He fell after he got off.
Q. Where?
A. Between the rails; he raised up his leg to keep the car from running over him.
Q. Did he?
A. No, sir; it ran on top of him and then it stopped; then we raised the car on one end and tried to take him out; he was fast in the cog wheels. Do not know whether right or left leg, and we could not get him out, and so Mr. Kirk said to take hold and
67 take the car off and him together; so we turned it around and we pushed the car from the track down the dump.
Q. Was the train coming all the time towards you?
A. Yes, sir.
Q. Did it stop or slacken speed?
A. I could not tell; the train was close to us and I did not have time to notice it; I was afraid the train would run into it and so I done the best I could.
Q. Did the train give any whistle or alarm?
A. Not until it was pretty close to us, and then they whistled a short whistle, the same as they whistle when there is cattle on the track.
Q. Did they whistle before they went into the cut?
A. No, sir.
Q. How deep is that cut?
A. About the height of a car—maybe a little lower.
Q. How far from the place where the accident occurred did the train go?
A. I seen the engine first coming right in the cut, and where we got the car off from where I seen the engine first, and we tried to

stop the car, it is between four and five telegraph poles from where we seen the engine to where we throwed the car off.

Q. How far by the hand car, did the engine go before the train stopped?

A. The train passed us.

Q. How far did the caboose go before it stopped?

A. Probably about sixty feet past us.

Q. How far from where you first saw the train did the accident occur?

A. It might have been seven or eight telegraph poles.

Q. When you first saw the train?

A. It might have been a lttle further than that, but it could not be much.

Q. How far did the train have to go from where you first saw it to where the hand car stopped?

A. It was between four and five telegraph poles.

Q. When did you see the cut last?

A. Yesterday morning.

Q. Did you go by there?

A. Yes, sir.

Q. Who was on that hand car besides yourself and Mr. Charless?

68 A. There was I and Kirk and two men besides us; they had been working there quite a while, but I forget their names.

Q. In what condition was the brake on that hand car?

A. I believe it was a 2 x 4, about so high (indicating). It was put on one side by a bolt or heavy spike.

Q. How attached to the car?

A. It was fastened; I believe Mr. Kirk bored a hole through it.

Q. Mr. Kirk fixed it?

A. Yes, he fixed the brake that was on at the time of the accident.

Q. Did you see him fix that brake?

A. Yes.

Q. Did Mr. Kirk ever ask the roadmaster for a new car?

A. I was not there when he asked him.

Q. Have you any knowledge that the foreman asked for another car or this one to be repaired?

A. He said he did.

Q. Who?

A. Mr. Kirk.

Q. Did he say what was told him?

A. I do not know.

Q. Did you attend to the brake any?

A. Sometimes I did—not very often.

Q. Tell the jury the condition of that car otherwise than as to this brake. What sort of wheel—whether they were mates—as to the cog wheels, etc.

A. The cog wheels sometimes in heavy pumping slipped.

Q. Would the cog wheels slip any time when you attempted to stop the car?

A. They used sometimes, when there was heavy pumping.

Q. How many wheels had the car?

A. Four.

Q. Were the wheels all alike?

A. No, sir.

Q. State what difference.

A. Two were alike, and the other two did not belong to the same car.

Q. It was a patched-up car, wasn't it?

A. Yes, sir.

Q. What date was this when the accident happened?

A. I believe it was the 28th of August, 1886.

Q. State to the jury how you know it was on that date.

69 A. I know that Mr. Kirk sent in time generally about two days ahead, and then the men did not get out that day, so I remember; we had been talking about it.

Q. Can you swear positively that Mr. Charless jumped away from that car?

(Objected to.)

Q. State how Mr. Charless got off that car.

A. He was pumping, standing with his back to the train; he was pumping, and when somebody said there was a train coming I saw he held back; then he looked over to us, then I saw him turn half a little to one side; then he got off and fell.

Q. You say he got off and then fell. Did he make any effort to get off the car?

(Objection taken. Overruled.)

Q. Did Mr. Charless make a motion himself to get off the car?

(Objection taken. Overruled. Exception allowed.)

A. Well, that is all I can say; I saw him hold back; then he turned around and looked towards the train, and then he got off and fell; then he put his foot towards the car to keep the car from running over him.

Q. How long had you been working on the section?

A. I commenced about the 15th of April and I worked until September.

Q. Had you used a hand car before that time?

A. Yes, sir.

Q. Was it a hand car like this one?

A. Yes, something like that.

Q. Were the brakes like it?

(Objection taken and sustained.)

Q. Was that a sufficient brake?

(Objection taken. Overruled. Exception allowed.)

A. It was just as I tell you; it was made out of a 2 x 4, about so long, put on one side of the car.

Q. I mean, by sufficient, was it a good brake? Would it stop the car?

A. No, sir, it was not a good brake.

Q. If it had been a good brake, would it have stopped the car?

(Objection taken. Overruled. Exception allowed.)

Q. If it had been a good brake, could the hand car have been stopped in time to get Mr. Charless off?

(Objection taken. Overruled. Exception allowed.)

70 A. If it had been a good brake, I believe it could have been stopped.

Q. How soon after you got the hand car off, did the train pass by?

A. It just passed by just after we got him off; there was no time to spare.

Cross-examination:

Q. This brake was a 2 x 4?

A. Something like that.

Q. When you used brakes you always used 2 x 4's, didn't you?

A. It was the only car I know where we had such a brake.

Q. That was the only car on the section?

A. Yes.

Q. That is the same size of brake used by sectionmen, isn't it, on those cars?

A. Well, they used it, of course; there was no other brake on it; they had to use it.

Q. You could have used the car without the 2 x 4?

A. I suppose we could have stopped it.

Q. You could have used it with the brake that was on before that 2 x 4?

A. We could have used it, yes.

Q. The men were liable to get off anywhere and pick up a 2 x 4 for a brake, were they not?

A. They would have had to put something to make it hold.

Q. Were they not liable to get any kind of stick?

A. They used it all the time after Mr. Kirk had fixed the brake; it was the same one all the time.

Q. He fixed the brake two weeks before this accident, didn't he?

A. I believe it was a little sooner than that.

Q. How long have you been using that brake?

A. I think he put it on right away after he came there, inside of two weeks.

Q. He came there in July, didn't he?

A. He came the 4th of July.

Q. You had been running that brake about a month, hadn't you?

A. A little over that.

Q. You had been running with that car in that condition at the time of the accident for more than two weeks, hadn't you?

A. We had some trouble with it.

Q. Your trouble was before this accident quite a while?

A. I do not know how long before. She was out of shape.

71 Q. How many weeks?

A. Probably three or four.

Q. Now, was it possible to use in that car a brake larger than one 2 x 4? Could you handle it conveniently?

A. I do not know.

Q. Would not that be the regulation size for that kind of brake?

A. Mr. Kirk made it as handy as he could; it was about so long (indicating).

Q. Could you conveniently get your hands around and handle a break if heavier than 2 x 4?

A. You could not get your hands around it.

Q. How large around was it?

A. Maybe it was a little thicker than my hand on the end where we held it in our hands; then it increased in width and size from that down; from there on it was thicker.

Q. You were looking out for a train, were you?

A. Yes, we were looking that way, like we always did.

Q. You always were looking for a train when out with the hand car?

A. Yes.

Q. Charless and the others handled the brake at times as well as yourself, didn't they?

A. I do not know that Charless handled it often; there was a man there; we always had our places, we generally stood in one place all the time.

Q. You did not always handle the brake, did you?

A. If the same man was not there, then some one else had to handle it.

Q. Who handled it on that occasion?

A. I do not know; I was standing right ahead of the brake with my back towards the brake, so that I do not know who handled it.

Q. The brake was in the middle of the car, between the wheels?

A. Yes.

Q. It worked the rubber block on both wheels with that one lever, didn't it?

A. No, just one wheel, and that wheel loose.

Q. How long had you been running with a loose wheel?

A. The wheel was broke and Mr. Kirk said he sent for another and could not get one; so he found one, but could not get it on and so got a blacksmith to fit it.

Q. Is it not a fact that you had been running with the car that way for several weeks?

72 A. Yes.

Q. You and Charless knew all about it, didn't you, during the two weeks?

(Objection taken. Overruled. Exception allowed.)

A. Yes.

Q. You were around there after the accident happened to Mr. Charless quite a little while, figuring how to get that hand car off the track, weren't you? You lifted up one end as I understand you, and found you could not get it off, and took it up and then sloughed (?) it around and in that way pulled it around with Charless? You tried two or three times?

A. We lifted up the car and tried to get him out. He was fastened and we could not; so Kirk told us to take the car off, so we lifted up one end. I was standing behind—had been pushing; then we pushed the car over the rail, and that is the way we ran it down the dump.

Q. You first tried it one way and then another?

A. We tried to take Charless out from under the car first. Then we could not; he was fastened; so we lifted up one end—could not lift it altogether, then we turned around one end of the car and then ran it down the dump.

Q. Before you got it off you went to the other end?

A. No, sir; the other end had to turn the same as the other. We picked up one end of the car and turned it around and then lifted up a little behind so that she could run over the rails.

Q. Before you started to do this, you asked Charless if he was hurt?

A. I have no doubt we asked him.

Q. Did you ask him before you started to work on the car?

A. He laid there and could not get up; we had to carry him into the caboose.

Q. All this time that you were talking to him and lifting the car this train was coming right along, wasn't it?

A. The train was going after we were there about a mile and a half, close to two miles.

Q. How far apart are telegraph poles?

A. I cannot tell.

Q. Why do you measure distance by telegraph poles?

A. I cannot tell anybody; I just count telegraph poles and that is all.

Q. Did you count or estimate them?

A. I do not know how far apart they are.

73 Q. How far would you judge the distance to be when you say seven or eight telegraph poles?

A. I would let some one else say who knows.

Q. Then you judge from what somebody else told you and not from what you know of the matter?

A. I have never measured it.

Q. How did you determine that that train was seven or eight telegraph poles from you?

A. I know where we seen the train, what place we were when we seen the engine coming, from there to the place where we threw the car off—that is, between four and five telegraph poles.

Q. It was seven or eight when you first sighted her, and, as you say, Mr. Charless commenced diminishing the speed of the hand car?

A. I do not understand.

Q. How far was the train from your hand car when you first saw the train, in feet or yards?

A. I cannot tell how far apart they were.

Q. How long were you on that section?

A. From April until September.

Q. You knew distances on that section, didn't you?

A. Yes, I knew as far as our section was, how far it went.

Q. In doing work, weren't you accustomed to making measurements?

A. I did not—the boss did.

Q. You say the curve was two miles from Cheney; how do you know?

A. There is a sign-board up one mile from Cheney; I think it is about three-quarters of a mile from there to that place.

Q. How far from that place of the accident to the point where you first saw the train?

(No answer.)

Q. You say you know the depth of that cut, and that it is as deep as the height of a car; how did you make that estimate?

A. It is something like that; it is either higher or lower.

Q. If lower, how much?

A. It cannot be much, I do not think.

Q. Will you swear that it is over four feet?

A. Yes.

Q. How much over?

A. I cannot swear how high; I never measured it.

Q. That is not much of a curve?

74 A. It is a long curve.

Q. You can see around it pretty well, can't you?

A. Yes, but that day we could not see.

Q. How could you see seven or eight telegraph poles?

A. We could see that far away, smoky as it was; could not see much further.

Q. You were particularly on the outlook for a train because it was smoky, weren't you?

A. We always were looking out.

Q. Now, in addition to the smoke from these fires, there was a little mist or fog, was there not?

A. I guess it was smoke.

Q. Do not think there was any mist or fog?

A. No.

Q. You never heard anybody talk with the section foreman about this car? You never heard the roadmaster talk with him about it, did you?

A. No, sir.

Q. Now, what you know about Mr. Kirk saying he would fix the car, and had sent for wheels, was what Mr. Charless told you, wasn't it?

A. Charless did not tell me anything; he said he would get another car because we had to go on three wheels.

Q. Then you do not know anything about Mr. Kirk saying anything of that kind about getting a new wheel?

A. He was trying to get a new car; he had to get a car or wheel to go to work again.

Q. You did not know whether it was a car or wheel he was going to send for, did you? What you claim to have heard about the wheels and car, was it before or after the accident?

A. Before the accident.

Q. You do not know whether it was concerning the cars or wheels, do you?

A. He said he was going to get a wheel or car to get out on again.

Q. You never heard Charless ask for a new wheel or car, did you?

A. No.

Q. Mr. Kirk did not tell this to you?

A. He told it to whoever heard it.

Q. You heard the boys talking about it, didn't you?

75 A. There was a good deal of talking about it all the time, about the new car.

Q. Talking of a new kind of car, weren't they; different style of car?

A. I do not know what kind of a car we were expecting.

Q. Are telegraph poles any more than sixty feet apart?

A. I do not know how far apart.

Q. Are they more than ten feet apart?

A. Yes, more than ten feet.

Q. More than twenty?

A. They look as though they were more.

Q. Are they less than fifteen?

A. No, I do not think so.

Q. Are they more than twenty-five?

A. I think they were.

Redirect examination:

Q. Did you know that the regular passenger train was due at that time?

A. It was not quite time for the passenger yet. We had been looking out for a train anyway.

Q. How long did it take you to get off the car when you commenced, after it had stopped?

A. It did not take a long time; we did not have much time; we had to hurry as quick as we could; we picked up the car and tried to get him out; as soon as we got the car off then the train passed us.

M. G. MARTINDALE, called for plaintiff.

Q. State your name and business.

A. M. G. Martindale, Spokane Falls, general agent Connecticut Life Insurance Company.

Q. How long engaged in that business?
A. A little over a year.
Q. Have you a table showing the expectancy of life?
A. I have.
Q. What is that table?
A. The American experience table of mortality, as used by insurance companies.
Q. Is it recognized as standard?
A. It is, by all American companies.
Q. Turn to that table and from that state what expectancy of life a person of good health, aged twenty-five.
A. 38.81 years.

76 (Table introduced as evidence, marked "Exhibit A.")

W. LOCKHART, called for plaintiff.

Q. State your name.
A. Wilson Lockhart.
Q. What is your occupation?
A. Physician and surgeon.
Q. How long practicing?
A. Thirty years.
Q. Both in surgery and medicine?
A. Yes, sir.
Q. Are you acquainted with the plaintiff?
A. I am.
Q. Have you ever examined his condition?
A. Yes, sir.
Q. State to the jury his injuries, where he is injured, how, and as to its permanency.
A. He had an injury to the spine; I have not seen him professionally for two or three years. I examined him at the hospital two or three years ago; he had an injury to the spine that I regarded as incurable.
Q. Did you examine him as to the condition of his nervous system?
A. I examined him more or less casually, enough to make up an opinion as to the nature of his trouble.
Q. State what that was.
A. He had paralysis from the injury that he received.
Q. State what part was paralyzed.
A. The lower extremities.
Q. Had he any use of the limbs?
A. Not then; no, sir; or very little.
Q. State what injury he had to his bowels, if any—as to his back—power to notice calls of nature—his bladder?
A. I do not remember particulars about that, but I know that in such cases generally the bladder is weak and the patient is unable to retain his urine well.
Q. How as to his bowels?

Q. I do not remember whether he had diarrhœa or constipation; both are likely to occur.

77 Cross-examination:

Q. You say you did not examine as to paralysis of his bowels?

A. I understood at the time that he was troubled with his bowels or bladder.

Q. Did you not also understand that he had had that trouble, but that it had ceased, and the only thing remaining was paralysis of the lower limbs?

A. I could not state; it is three years since I saw him; just what particulars I received as to that I do not remember.

Q. Now, this was not a concussion of the spine?

A. Some injury to the spine, of course. The spine is distorted; it was then; it was something more than a concussion, perhaps; a concussion would be a sharp blow upon the spine. When I examined him there was an alteration of the structure, as though there had been a fracture or dislocation. There was a very apparent alteration—some projection outward.

Q. Was that not more of a dislocation than a concussion?

A. I could not say; dislocations are very rare in that part of the spine; they are more likely to occur in the cervical.

Q. This you found to be the seventh or eighth dorsal?

A. I do not remember the point; I think about that; I have not examined him since.

R. S. HARVEY, called for plaintiff:

Q. State your name?

A. R. S. Harvey.

Q. What is your occupation?

A. Physician and surgeon.

Q. How long practicing?

A. Twenty years.

Q. Have you examined plaintiff? How recently?

A. I examined him twice; I think three days ago.

Q. Will you state to the jury the nature of his injuries and how he was injured?

A. I found upon examination, after oral examination, I found that he had received a serious thromatic of the spine.

Q. State the effect on the spine and on the lower limbs?

A. I found upon examination that the patient was injured at a spot called the twelfth dorsal vertebra; they had evidently been fractured; the posterior part of the back bone is evidently fractured and evidently quite a concussion and wrench given to the joints; as a result he became paralyzed, and now is certainly, physi-

78 cally, absolutely paralyzed from the seat of injury down, so that with the insertion of a needle into his penis he absolutely would experience no sensation; he is also paralyzed as far as his bladder is concerned, and he is not conscious of any attempt to even pass water or the contents of his bowels.

Q. State what effect this would have on his general health—on his nervous system?

A. It would affect that portion in a manner. It would not necessarily affect the upper portion of his body, except the effect a sedentary life would have—the effect of not having an active life; but it would not affect him dangerously.

Q. How lately have you attended him?

A. I only saw him two times, two days ago, day before yesterday.

Cross-examination:

Q. His general health is reasonably good?

A. It seems to be.

Q. You say this paralysis of the bowels and bladder is not subsiding?

A. I only found this out as an oral examination; he tells me he does not find any sensation.

Q. He might retain his general health in very good condition, might he not?

A. Yes, possibly, in a limited way.

C. G. BROWN, called for plaintiff:

Q. What is your name?

A. C. G. Brown.

Q. What is your occupation?

A. Physician and surgeon.

Q. How long have you been practicing?

A. Fifteen years.

Q. State whether you are acquainted with the plaintiff.

A. I have seen him about the hospital.

Q. Have you examined his physical condition?

A. Yes, day before yesterday.

Q. State the result of your examination.

A. I found paralysis of the lower extremities.

Q. State what effect upon his bladder, urinary organs, etc.

A. He has almost entirely lost sensation, of course; would not be able to tell when his bowels were moving or when his bladder was active.

Q. Was he in a condition to need constant attendance?

79 A. If he would keep clean he would have to have an attendant.

Q. State what effect the injury would have upon his general health.

A. It would result in wasting of the tissues in the lower extremities and an impaired circulation. He has a number of sores on his buttock now from sitting—one quite extensive.

Q. Did you discover from your examination whether there was any sensation in his lower extremities?

A. None except on the interior portions of the thighs; none on the buttock or lower portions of the leg.

Q. How about his general health?

A. Not knowing the man I should judge he was in very fair health.

Plaintiff here rested his case.

(Motion offered by attorneys for defendant to dismiss the case; motion overruled; exception allowed.)

That upon the close of the foregoing testimony and evidence, which was given by or on behalf of the plaintiff in the opening of his case, the plaintiff rested his case, without giving any further testimony or submitting any additional facts in evidence; that upon the resting of his case by the plaintiff upon the evidence and testimony as hereinbefore set forth, the defendant, by its counsel, by motion, made application to the court for an order dismissing said cause, and for the nonsuit of plaintiff, for the reason and upon the grounds that said plaintiff had, by said evidence and testimony, given as aforesaid, failed to make out a case against the defendant, and said defendant was not required to be put on its defense, and that said evidence and testimony was not sufficient to establish any liability on the part of, or justify any recovery against the defendant; also that it appeared from the evidence and testimony on behalf of the plaintiff, and there was disclosed thereby, the fact that whatever injuries were sustained or incurred by plaintiff were occasioned by, or the result of, the carelessness and negligence of plaintiff himself, and the careless and negligent acts of his fellow-servants engaged in the same employment, for which the defendant was not and is not responsible to the plaintiff, and that there was nothing in said evidence or testimony to show or establish that the injury to plaintiff was occasioned by, or occurred through, the negligence of the defendant, or any of its servants, agents or employés; that after argument upon said motion then and there made by counsel for the respective parties, the court then and there denied said motion, and required said defendant to pro-
80 ceed with its defense to said action; that the defendant then and there, by its counsel, excepted to the order of the court denying said motion, which said exception was then and there allowed by the court; that afterwards said trial further proceeded by defendant submitting and offering in evidence testimony as follows, to wit:

Defense.

V. M. MASSEY recalled for defendant:

Q. You stated you were roadmaster at the time of this accident; state what was the condition of that road at that time and now, as to curves and cuts from Cheney west, covering the section this was.

A. As you are going out of Cheney you are going a little bit up grade for possibly a mile and a half, or such matter—very slight. There is a very slight curve also until you get about two miles from Cheney, where there is a long curve—about three and a half or four degree curve. Before entering into this cut (if I remember right,

this large cut is about the center of the curve) is a light cut two or three feet high. About the centre of this curve the cut is from six to eight feet high, but you can see by looking across the tangent on the opposite side of the curve.

Q. About what distance?

A. That would probably be eight or ten telegraph poles.

Q. That would be right through the curve?

A. Yes, across back of the rock.

Q. Could you see a train coming?

A. Yes, sir.

Q. What was the distance between telegraph poles?

A. All telegraph poles are supposed to be 300 feet apart. Some are shorter and some longer in case of rock, but on an average, if I remember right, they are 300 feet apart. It may be changed since I left, but I don't think so.

Q. They are as much as 180 feet?

A. They are not less; engineers keep time by telegraph poles; I have, when trying the speed of trains, timed it by telegraph poles.

Q. Are they usually burning brush in August?

A. Not often; sometimes fire in August if it is dry, sometimes a spark from the engine will start a fire.

Q. I understand you to say you furnished the cars and appliances and fixtures for the repair work on this section?

A. Yes, sir; they come through my office.

81 Q. What would you say as to the appliances in connection with the hand car that was furnished there?

A. So far as I know, they were good for the section. The section was an easy one—the easiest on the division. The car was supposed to be good enough for that section.

Q. Were there any defects in the car furnished for that section?

A. Not to my knowledge.

Q. Was it ever objected to?

A. Not to my knowledge.

Q. You saw the car often?

A. Every time I passed, as I passed on the train.

Q. You walked over the section and saw it then?

A. Yes, sir.

Q. You say the brake was usually a 2 x 4?

A. I would not say as to the exact size—something about that, or even less, would be strong enough.

Q. Where was it obtained and how put on?

A. Generally the section put it in—got it along the road wherever they could pick it up; they could get it from the company by ordering it.

Q. When these cars went into shops for repairs and had on a wooden brake-lever, what was done with them?

A. If I remember rightly, I think if the lever was all right, it was left.

Q. What was the nature of the curves on the west end of the section?

A. They were sharper and closer together—quite curvy. West

of Woods, west of Cheney, it is one reversed curve after another until you get almost to Stevens.

Q. You could see the top of the engine and cars above this cut, couldn't you?

A. Yes, sir.

Q. What would be the difference between the top of the cut and the top of the car?

A. I think the top of the car would be higher than the cut; that is my idea at the present time.

Q. How many feet?

A. I cannot say exactly; the smokestack of the engine is higher than a car; that could be readily seen, I think.

Q. About how long would it take a train running at thirty miles an hour, seven telegraph poles away from a hand car when
82 first sighted, the hand car running at ten miles an hour, how long would it take to come together in collision?

A. That is a mathematical problem, of course. It could not take very long.

Q. Suppose a train was running thirty miles an hour against a hand car running ten miles an hour, how long would it take, only one hundred feet between them?

A. Probably two or three seconds.

Q. Then if the train did not pass or come to where the car was for the period of a minute, it would be more than one hundred feet distant?

A. Yes, sir; I would think so.

Q. You are acquainted with the running of trains there at that time.

A. Regular trains; yes, sir.

Q. About what was the maximum of freight trains?

A. From fifteen to eighteen miles—not over twenty miles per hour. Schedule trains regular rate was fifteen miles over the division.

Q. How long were you with the Northern Pacific?

A. About four years.

Q. That was about what time prior to 1886?

A. I went to work during 1884 and staid there until three years ago next July.

Q. You had charge of the repair department, didn't you? Improving and keeping up the track?

A. Yes, sir.

Q. During this time, covering the period of 1886, what were the regulations, or were there any of any kind concerning any notice to repairmen while on the track?

A. There was; that was that they should always be on the lookout—that they might expect trains at any time.

Q. Did they have notice of any particular trains?

A. Regular trains.

Q. What notice other than the regular time-schedule?

A. None.

Q. Did they ever have, during that time, any notice, or was any

one required to give them notice, under the regulations of the company, of the approach of other trains?

A. No, sir.

Q. How did they know of their approach?

A. Only by one train carrying flags for another; that was
83 the only way a second section could be known, and any extra they must keep their lookout for; notice to that effect was in all time-cards.

Q. Was there any regulation by the company as to the right of the company to change the time of running trains without notice?

A. Yes, sir; they reserved the right to change the time of any train at any time without notice to the employés.

Q. When the men were out on the section they were liable to be shifted to one portion or another without returning, were they not?

A. Yes, sir.

Q. What possibility was there of giving notice of trains?

A. None whatever.

Q. Did the sectionmen understand that?

A. That was their instructions; they were supposed to understand it.

Q. Then, when out in that way they would know as much about it as the section foreman?

A. Certainly; when they were running on the car they were supposed to keep the same watch with the section foreman, that is part of their duty—watch either for trains or damage to the track.

Q. What is their duty?

A. That is their duty.

Cross-examination:

Q. Did you in going over the road in that time, 1886, make special observation as to any particular car?

A. No, sir.

Q. Then you have no remembrance as to the particular condition of this particular hand car?

A. I know that if particularly bad I would have remembered it, that is all.

Q. How often did you pass along and make observations?

A. I was supposed to make observations every time I went over and find anything wrong if I could; that was my duty.

Q. You had seen this car often before the accident?

A. Probably as often as I passed along—probably saw it one day and not the next; would see it standing there, that is all.

Q. Your statements are merely from your remembrance and habits of doing business?

84 A. Yes, sir.

Q. You consider that, when the company reserves the right to change the time of running a train at any time that the section hands will have to learn the best they can as to the running of trains?

A. They will have to keep a lookout for trains; they are supposed to do so. Trains are supposed the right of way over sectionmen at all times; that is the sum and substance.

Q. The company is supposed to furnish them sufficient means for them to protect themselves in looking out for trains?

A. Certainly.

Q. You remember the date this accident occurred?

A. I do not.

Q. You do not remember whether a clear or smoky day?

A. I cannot remember it being smoky; I came up on the passenger going east and if it had been very smoky (I am always looking out for fire), I would have thought of it; have no remembrance of its being smoky.

Q. How far across from one tangent to another of that curve?

A. Probably from eight to ten or eleven telegraph poles.

Q. Was it the section boss' duty to look out for wild or extra trains?

A. It was the duty of all of them—all of the employés with the section foreman.

Q. Do you know how long after this occurrence you came in with the passenger?

A. Short time, I think, if I am not mistaken, that it passed the freight train at Marshall or caught them at Spokane; could not be over one-half or three-quarters of an hour behind.

—— LYNCH called for defendant:

Q. Where do you reside?

A. Spokane Falls.

Q. What is your occupation?

A. Roadmaster, Northern Pacific.

Q. Between what points?

A. Between Hope and Cheney, on the Spokane & Idaho.

Q. Where were you in 1886; in what employment?

A. Roadmaster for the Northern Pacific, Sprague to Wallula Jet.

Q. Are you acquainted with the kind of car and brake that has been described?

85 A. Yes, sir.

Q. Can you state as to that being the kind and character used at that time upon the road generally?

A. Yes.

Q. How was it on your division?

A. About the same kind as used in this case.

Q. How as to the brakes and wooden levers?

A. There were different kinds of brakes; there was one you could step on and another you could fix on the side of the car and use your hands.

Q. What was the benefit of the brake on the side?

A. I think you could get more leverage from the brake on the side.

Q. What kind of timber was used and how adjusted?

A. It was adjusted with a bolt in the frame of the car, and then this piece of timber went on there; you could make it out of a 2 x 4 or a 2 x 6; the 2 x 6 was too large; it would have to be dressed down.

Q. What was usual?

A. They took most any kind of a piece of wood, drilled a hole in the bottom and ran a bolt through it and the car; a 2 x 4 would make a very good brake.

Q. Are you acquainted with all the different kinds of hand cars used in railroading?

A. What I have seen out West; we may not have this car ourselves now; we have an improved car.

Q. That improved car came in later years?

A. Yes, sir; in the last two years.

Q. Is it any different car?

A. About the same, with a Sheffield wooden wheel; the Northern Pacific used iron wheels and heavier; the car is now lighter.

Q. What experience have you had in operating these hand cars such as you used in 1886?

A. I went to work for this company in June, 1884; we have used them about four or five years, and still use some of them.

Q. Are you using any of them now on your division?

A. Yes, sir.

Q. What experience have you had as roadmaster?

A. About eight years.

Q. How long were you in repair-work—section-work?

A. Sixteen years next June; that is my time railroading;
86 prior to the last eight years I worked on the track as hand laborer, section hand and roadmaster.

Q. From your experience in the handling of hand cars and repair-work, what would you say as to the distance in which any hand car can be stopped, running at ten miles per hour?

A. Not less than one hundred feet with any kind of brake I have seen, to the best of my belief.

Q. What would you say as to the character of brake by which it can be most readily stopped within that time.

A. I will take my chances with a lever as quick as with a new and improved brake; you get more purchase on the car, I think; I have used them on the Santa Fé with a grade of 185 feet to the mile.

Q. What would you say as to the possibility of a key dropping out of a brake on any hand car?

A. It is liable to drop out of any car; the best I have seen is the Sheffield car, and they frequently drop out. They go on to the shaft with a key, and there is also a slot cut in the key. Sometimes these keys work loose and drop out; you have to have another key; the lever turns right around. That is just as liable to occur in the Sheffield as any other; I have seen it occur in this car as well as in the common hand car.

Q. In 1886 this section of road had been how many years in operation?

A. I think the contract was let in 1881 or 1882—probably in 1881, five years.

Q. Did you have the improvements and appliances and condition of road then that you have now?

A. No, sir; not so good—that is, our road-bed was not as good then as now; we have put in a lot of ties since.

Q. Been improving the road right along?

A. Yes, sir, every time the ties wear out; we commenced renewals in 1886.

Q. Have there been any improvements in the way of patents, new devices in hand cars since then?

A. Not that I have seen; they make a lighter car now, with wooden wheels; the iron-work is not as heavy as the old car. The new car is not as durable as the old one.

Q. Any more easily stopped?

A. No, I think not.

87 Q. What were the regulations of the company with regard to notice to repairmen while out on the road with hand cars as to approach of trains?

A. They had no notice, except from the time-schedule, but they were never notified when they were going to run an extra train; they were expected every moment and everybody had to look out for them.

Q. What instructions were there to sectionmen to keep a constant lookout for trains and to expect them at any moment? Were there any specials or extras running at that time?

A. Not as many as now.

Q. About how many?

A. That is pretty hard to say; maybe two or three a week—maybe two or three a day.

Q. They were liable to go out any day?

A. At any moment.

Cross-examination:

Q. You say that some of the hand cars that were furnished from the shop were stopped by a brake pressed down by the foot. Describe that to the jury; show the jury by a sketch.

(Sketch drawn and shown to the jury.)

Q. What kind of brake-blocks in that style of car?

A. Wooden brake-blocks and wooden brake-beams. Some of the foremen used to put rubber and some leather on the blocks.

Q. When there was, it assisted in stopping the car?

A. A little, but not much.

Q. These brake-blocks were concaved to fit upon the wheel, weren't they?

A. Yes.

Q. And fitted the wheel surface on the bottom of the wheel?

A. Yes.

Q. Do you undertake to say that a simple lever, with a surface of

about two inches, without any concavity, pressing upon the wheel, would stop a hand car quicker than pressing on these two brake-blocks with a concave surface?

A. I undertake to say it would stop just as quick.

Q. What about the length of these brake-blocks from one end to the other?

A. They may be about five or six inches.

Q. About how wide?

A. Two inches.

88 Q. In each one there would be a surface of 12 inches on the wheel?

A. Yes.

Q. And 24 inches on the two?

A. Yes.

Q. In this simple pressure of the lever, there would only be a contact surface of two lineal inches across the lever—that much space on the wheel?

A. Yes.

Q. You say these brakes were used, pressed by the foot, in 1886 and before?

A. They were both used, the lever and the brake.

WILLIAM KIRK called for defendant:

Q. Where do you reside?

A. In Marcus, Stevens county.

Q. Where were you in August, 1886?

A. I was in the employ of the Northern Pacific, on the Idaho division, under V. M. Massey as section foreman.

Q. When did you go into that employ?

A. About 1882 or 1883 on that section; I went there on the 3d July.

Q. How long did you remain there?

A. Until about the middle of September.

Q. What did you find there on that section in the way of a hand car?

A. An ordinary hand car, the same as used everywhere. When I went there the brake was broken; I put a lever brake on.

Q. Was that the condition you found it in when you went there?

A. Yes, sir; I put a lever brake on; it is considered, as far as my knowledge goes, superior to any other brake in handling heavy cars. It consisted of a 2 x 4, three feet six inches long, bolted on the side of a car. The side of a car is made usually of a 2 x 6 hard-wood timber; you bore a hole so that your lever, 2 x 4, will bear on the front wheel and the hind wheel at the same time. When you bear down on the hind wheel you press up on the front wheel and it gives you more purchase—a dead purchase.

Q. How long did you continue to use that lever?

A. Until I left there.

Q. The same kind of lever?

A. I did not make any change.

Q. Did you know the plaintiff in this case, Hugh Charless?

89 A. Yes, he worked for me there; I have no particular acquaintance with him.

Q. Was he there when you went there?

A. Yes, sir.

Q. Who paid the men on that section?

A. F. P. Weymouth was paymaster.

Q. What other occupation did he have in connection with the company?

A. Division superintendent.

Q. You received your pay from the superintendent the same as the other men?

A. Yes, sir.

Q. You may state, if you remember, the occurrences which took place at the time that Charless was hurt.

A. I would like to state that I made a report about that time in writing and sent it in; it would be nearer than I could state now after the lapse of time.

(Objection taken.)

Q. You do not know where that report is?

A. No, sir; I have not it now; I sent it in to the company; I suppose they have it.

Q. Tell just what occurred there.

A. It is a long time since; as near as I can remember, we were loading wood in the yard; we started out about half past seven or eight o'clock, or it might have been later. We were looking for the passenger—that is, we knew it was on the road between Sprague and Cheney; we got about a mile and a half or three-quarters to this curve; I should judge it to be a 3¾-degree curve. When we got to the tangent on the end, it is always customary to stop; we stopped and listened, but could not hear anything, and went on and got about the middle of the curve, when somebody says, "Here she comes now;" the man at the brake, on the brake side, put the brake on; the car stopped rather suddenly and I looked again and saw Charless in the track ahead of the car and the car just running up over him, with his feet up; whether he fell or jumped I do not know; I cannot be positive. We then stopped the car, probably in ten seconds, and it probably took 20 or 25 to get the car off. The train was, at least calculation, when we first saw it, five or six telegraph poles away—all of that.

Q. You are familiar with the telegraph poles at that time; how far apart?

A. They are all the way from 60 to 70 yards apart.

90 Q. What did you do with Mr. Charless?

A. We flagged the train and carried him up and put him on the caboose and took him to Cheney, and there turned him over to Mr. Massey, roadmaster, who happened to be there. I told him the circumstances and he said he would take care of him and see that he went to the hospital, which the physician recommended should be done.

Q. Did you call in a physician?

A. Yes, sir.

Q. How soon after you got into Cheney was it that the passenger arrived?

A. Only a few minutes; I cannot say exactly; probably 10 or 20 minutes.

Q. How far could you see down this track when the train was approaching, from where you were on the hand car?

A. 600 or 700 yards—five or six anyway, but it was a very foggy, smoky day.

Q. Whenever that car got out of order with regard to the brake-lever, or anything of that kind, you repaired it?

A. If it was simple I did it myself; otherwise I sent it to the repair shops at Sprague.

Q. On this morning when you went out, was the car in other respects, in addition to the brake, in good condition or otherwise?

A. Yes; I guess it was as good as usual.

Q. As good as it had been during the two weeks previous?

A. Yes, sir; I think so.

Q. As good as it had been during the month previous?

A. Yes.

Q. The wheels and the lever were in just the same condition, weren't they, that they had been during the month previous?

A. I could not say a month previous, because a short time before that I had put a wheel on; they got a wheel broke in putting the hand car on one evening. It did not occur in operating the car, but in putting it on the track we broke the wheel—the flange—so that it would not stay on the rail. We got a pair of wheels that were setting behind the old shed at Cheney, and I got a certain gunsmith to cut the axle off so that the wheel would fit.

Q. How was that wheel as to the other one?

A. It was a good wheel—nothing the matter with it.

Q. How long had you handled hand cars?

A. About three years.

Q. As section foreman?

91 A. Yes, sir.

Q. Had you handled just this class of cars?

A. Yes.

Q. Where?

A. On the Northern Pacific.

Q. At what other points?

A. Sand Point, Rathdrum, Spokane Falls, Trent, Marshall Junction.

Q. You had handled the same class of cars at all these points?

A. Yes.

Q. Same kind of lever?

A. Well, no; not the same kind of lever all the time; had the same kind at Algoma and Sand Point, but at Trent, where we had a straight track, we had just the ordinary iron brake.

Q. What was the character of the track at Algoma?

A. Very steep and curvy—a good many bridges.

Q. At the time this wheel was put on, what was the condition of the brake-blocks and the brake-lever?

A. We had no brake-lever; did not need them.

Q. Well, the wooden stake?

A. It was all right, I guess.

Q. Just the same as it had been during all the time you were there?

A. Yes.

Q. And how as to remaining all the time until the time of this accident?

A. It was all right. I never heard any complaints and never seen anything wrong with it. Once the nut came off, I believe—the burr of the bolt.

Q. How long before this accident?

A. Two weeks.

Q. Did you notice on the day of this accident, any difficulty in stopping the car by the use of a brake-lever?

A. No, sir, I did not. I was not at the lever myself; there was a man, Bill something, at the brake. When he threw the lever down, being a very heavy man, he could almost stop it anyway; and I know he stopped very short because it gave me a jerk, and when the car ran into Charless the cogs caught in his clothes and stopped very suddenly; caught in his boot, I think.

Q. By the application of this lever the car had been almost stopped when Charless went off?

(Objection taken.)

92 Q. How near to a stop was it when he went off the car?

A. Probably going about a mile an hour when he struck; it had almost stopped when he fell, and his feet seemed to be up and strike the car and raised it from the track and sort of rolled him over.

Q. What rate of speed had it been running when you first sighted the train?

A. I should judge about 5 or 6 miles. I do not know.

Q. How did you get off that car?

A. That is a question I cannot answer. Of course, we all stepped off and lifted the car off before the train got there, but how we got off, after the car stopped, I could not say. In the excitement, Charless, being under the car, we raised it up and somebody got hold of him and told the boys to turn the car over and get it off. I got hold of one corner and lifted it around and that released him from the car, and just as soon as it was off the track he was lying partially on the rail and I pulled him over. By this time the engine had got within 25 or 30 feet of us, but they had slowed down to such an extent that they would not have more than knocked us off; still, they were going at the rate of 10 miles an hour when they passed us. They stopped the caboose within about 60 feet of where Charless lay and we packed him to the caboose.

Q. Do you remember about hearing a whistle from the train?

A. No, sir.

Q. Were you listening for a whistle, or looking for a train?

A. We were listening for a train. We used to listen, because it was an inconvenient place to get the car off.

Q. Was the work which you did about this hand car in the presence of the sectionmen, including Mr. Charless?

A. I suppose so. They were all near. It was one and all had a hand in everything.

Q. Did he know the condition of that car?

A. I guess so; I never asked him; he was there.

Cross-examination:

Q. You stated you flagged the train?

A. Yes, after the accident.

Q. Now, if the train had slowed up so much and was stopping, what was the necessity of flagging?

A. I wanted to put Charless on.

Q. Were they not stopping anyway?

A. I do not know.

93 Q. You pretend to say—do you testify that this brake rubbed both wheels on one side?

A. Rubbed the top of the hind wheel and the lower portion of the front wheel. Of course they did not always do that, but that is the idea of that brake.

Q. Was this particular brake arranged that way?

A. Yes, it was intended that way.

Q. Was it in fact rubbing on one wheel?

A. No, not always. It laid a good deal with the way we were running. If running on a curve where it was down grade and you wanted to slow up, you could hold your front wheel without pressing on the hind, merely by pressing with the brake.

Q. You had it arranged so that you could rub one or both?

A. Yes. When not in use it was standing straight up, out of the way.

Q. You say that when the car was running onto Charless' body, it stopped it. His clothes caught in the cog?

A. His boot leg, I think it was.

Q. It raised the car up?

A. Yes.

Q. You noticed that?

A. Yes.

Redirect examination.

(Mr. MITCHELL:)

Q. Do you remember whether you were all off the car when Charless went off?

A. No, there was nobody off the car when he was off first. He was the first man that I saw.

Q. He got off before any of the rest?

A. Yes.

(PRATHER:)

Q. And when the car stopped, the rest of you got off?
A. Yes.

FRANCIS A. POMEROY, called for defendant:

Q. Where do you reside?
A. Cheney.
Q. Practising medicine there?
A. Yes.
Q. Were you in 1886?
A. Yes, sir.
Q. Do you remember the plaintiff in this case, Hugh Charless?
94 A. I remember him, yes, sir.
Q. State whether he was brought to you on the 30th of August, 1886.
A. Yes, brought to the depot about that time and I was summoned to attend him.
Q. Who called you?
A. One of the sectionmen, I presume, or the boss.
Q. What attention did you give to him?
A. I found he had been injured in the spinal column. No external evidence, however, of injury. The bones, if they had been dislocated or fractured, I could not discover it. They seemed to go back to their place again, and as the train would soon be due going to the hospital and I was satisfied from the nature of the injury that he was badly hurt, I made him as comfortable as possible, which I did; I placed a roll of cotton on the seat of his spine and bandaged his body. I do not remember now, although I sent a statement with him, I did not keep note of the case; he went out of my hands soon. We put him in a cot in the baggage car and the baggage master took charge of him and sent him to Missoula.
Q. You furnished him with treatment while there?
A. Yes, sir; took the best care of him I could. All I could do, in my judgment, was done for him.
Q. You were the company's physician there?
A. Yes, sir.

That after the submission of the foregoing testimony the defendant rested his case; whereupon the plaintiff submitted, by way of rebuttal, the following testimony in evidence:

Rebuttal.

FRANK R. BETTIS, called for plaintiff:

Q. State your name.
A. Frank R. Bettis.
Q. Where do you reside?
A. Spokane.
Q. State what your occupation is.

A. I am working now with the city engineer.
Q. What has been your occupation until lately?
A. I have been railroading most of the time.
Q. How long?
A. Since I was 16 years old.
Q. How old are you now?
95 A. Twenty-eight.
Q. State what branch of railroading you have been engaged in.
A. In section-work and in running trains.
Q. Have you ever worked on the Northern Pacific?
A. Yes, sir.
Q. Did you ever work in running trains on the Northern Pacific?
A. Yes, sir.
Q. Are you acquainted with their time-card?
A. Yes, sir.
Q. Have you ever worked on a section gang?
A. Yes, sir.
(Objection taken to the course of the examination.)
The COURT: Testimony will be allowed as to brakes and appliances.
(Exception taken and allowed.)
Q. Are you acquainted with the hand car known as the Sheffield?
A. Yes, sir.
Q. How long have you known of that car?
A. The first time I worked with one was in 1885.
Q. Where did you work?
A. In Southern California, on the Central Pacific.
Q. Were they generally known at that time?
A. They were in that part of the country. I suppose all over the country.
Q. What sort of brake and wheel has that car?
A. The cars they had on the Southern Pacific had what is called the end brake. There is a beam fastened to the end of the car which projects a little underneath the car, and a rod running from that beam to a beam underneath the car, and to this beam underneath the car is a block which, when the brake is put on, rubs on the wheels.
Q. Are those blocks connected on each side of the car to rub on two wheels?
A. Yes, sir.
Q. How long are they?
A. About 5 inches.
Q. How wide?
A. About 2 inches.
Q. What are they made of?
96 A. Wood, or sometimes——
(Objection taken and overruled.)

Q. Were the blocks upon either side of the brake-beam concaved or hollowed out so as to fit the formation of the wheels?

A. Yes, sir.

Q. Where was the lever which worked the brake-blocks? On the front end of the car?

A. Whichever way most force could be applied to put on the brake, pulling towards the car; the man standing on the car would pull towards him.

Q. How high up would the lever come?

A. Two or two and a half feet. These cars were generally known in 1886.

Q. Have you worked upon the Northern Pacific lately?

A. Not lately.

Q. Within the last year?

A. No, sir.

Q. Have you ever seen the hand cars used by the Northern Pacific?

A. No, sir.

Q. A car with this sort of lever on the Sheffield car, in what length of time could the car be stopped, running from 6 to 10 miles per hour, with 5 men holding onto the brakes above and one on the lever?

(Objection taken and overruled.)

A. The car could be stopped in 50 feet on a level track; if on a downgrade, 75 feet.

Q. What would be the difference in time of stopping a car with such a lever as described by Lynch and with a lever and brake such as used on the Sheffield car?

A. That would be a mathematical problem. I never used one of those brakes used by Lynch. I could not say. It would be a problem to be worked out.

Q. From your experience as a trackman and a man on the section gang?

Ruled out by the court.

Cross-examination:

Q. As a matter of fact have you ever had any experience with a Sheffield car with a brake on the end?

A. No, sir.

97 Q. You never saw a Sheffield car with a brake on the end?

A. Yes, sir.

Q. Would you swear that a Sheffield car had ever been made with a brake on the end?

A. Yes, sir.

Q. Where did you see it?

A. On the Southern Pacific railway.

Q. How do you know it was a Sheffield car?

A. That is what it was called by the roadmen there.

Q. The same kind of car as described by Mr. Lynch when he was giving his testimony?

A. I did not listen to his description particularly.

Q. You never saw a Sheffield car in this country, have you?

A. I have not been around examining cars here; do not know whether they are Sheffield cars or not.

Q. I would ask you whether you did not apply to Mr. Lynch this morning for a place on the section and he refused it.

A. No, sir, I did not; I applied to Mr. Lynch last fall for a place on the section, and he promised me the first place he had; I asked him this morning, "Have you got that place yet?" He said he had not.

Q. What work do you do for the city engineer?

A. I carry poles and such work as that necessary to help the engineers.

Q. How did you gain your knowledge and experience with a hand car?

A. By experience; by hard work; all kinds of work done around on a section.

Q. How long since you have seen a Sheffield car?

A. I have seen hand cars very lately but have not taken notice whether Sheffield or what kind, as I am not following that business any more. The last one I took any notice of was on the Southern Pacific in 1887.

HUGH CHARLESS recalled:

Q. State whether that lever used on the hand car was arranged to rub one or two wheels?

(Objection taken and sustained. Exception allowed.)

JOE CARROLL, recalled:

(Same question, objection and exception allowed.)

That the rebuttal of plaintiff having been closed, the de-
98 fendant submitted, by way of answer to said rebuttal, the following testimony and evidence:

Mr. MASSEY, recalled by defendant:

Q. How many years have you been a railroad man? Do you know the Sheffield car?

(Objection taken and overruled. Exception allowed.)

A. Yes, sir.

Q. How long?

A. I have known it since used on the Northern Pacific.

Q. How long ago?

A. Just as I was leaving the road a few were coming on—about three years ago.

Q. Where is the brake on the Sheffield car?
A. Between the wheels.
Q. Did you ever see one with the brake on the end?
A. No, sir.

(PRATHER:)

Q. You do not know what they were before that?
A. No, sir.

Mr. LYNCH, recalled by defendant:

Q. You have Sheffield cars on the Northern Pacific?
A. Yes, sir.
Q. For how long?
A. I think three years ago we got the first for sections. We have got the sections most all full of them now; there are a few common hand cars now, but they are used for extra gangs.
Q. Where is the brake on the Sheffield car?
A. Between the wheels.
Q. Have you ever seen one with the brake on the end?
A. No, sir, nor anybody else.
Q. You did not know anything about the Sheffield car before three years ago?
A. Yes, sir.
Q. How long?
A. Seven or eight years.
Q. During that time you occupied the same position that you do now?
A. Yes, sir.

The testimony of both parties having been concluded, and the foregoing being all the testimony and evidence introduced
99 on said trial, defendant, by its counsel, by motion made at request to the court for an order directing the jury to return a verdict in favor of the defendant, for the reason and upon the grounds that the testimony and evidence submitted in the trial of the cause, and hereinbefore in this bill of exceptions referred to, was and is not sufficient to establish any liability on the part of defendant for any injuries sustained by plaintiff, and there was and is nothing in said evidence and testimony to justify the consideration by the said jury of the said cause or anything in relation to it.

Further, that it appeared from the testimony and evidence in said cause, that whatever injury was sustained or incurred by the plaintiff, was occasioned by his own negligence and careless acts and by the carelessness and negligence of those who were and are fellow-servants with him in the same employ, and for whose acts, as far as any injury to this plaintiff is concerned, defendant is not liable; and further, that it appeared from said evidence and testimony that whatever accident or injury occurred to the plaintiff was without fault or negligence on the part of the defendant, or any acts of its servants, agents or employés, for which it is responsible or

liable to the plaintiff; that the court, upon consideration of said motion, then and there denied the same; that the defendant, by its counsel, upon the denial of said motion, then and there excepted to the order of the court denying the same, which said exception was then and there allowed by the court, and the court then and there directed counsel for parties to proceed with the argument to the jury, and upon conclusion of said argument submitted said cause to the consideration of the jury.

That the court, in submitting this cause to the jury, gave to the jury, among others, the following instructions, which, immediately upon the retirement of the jury were excepted to by the defendant, through his counsel; which exceptions were, by the court, then and there allowed; that the instructions so excepted to and the exceptions made thereto, and the allowances thereof, are as follows, to wit:

The court, upon his own motion, gave the following instruction to the jury:

"I think that the case, when stripped of all the side issues and the incidental questions surrounding it, resolves itself into just this question for the jury to determine: whether the injury to the plaintiff resulted directly from the negligence of the defendant in needlessly exposing him to the danger of being hurt by a collision between the hand car and the extra freight train at the place where it occurred, or whether the injury was a mere accident, which was the result of one of the ordinary hazards of the employment in which he was engaged."

100 To the giving of which said instruction, defendant excepted, objecting to the submission by the court to the jury of the question whether the injury to the plaintiff resulted from the negligence of the defendant in needlessly exposing him to the danger of being hurt by a collision between the hand car and the extra freight train at the place where it occurred; no such question being involved by the pleadings, and its submission to the jury not being justified by anything in the evidence, which said exception was then and there allowed by the court.

That the court further, of his own motion, gave to the jury the following instruction:

"Whether it was an ordinary risk of his employment or whether an extraordinary danger caused by negligence on the part of the defendant; whether the negligence was the negligence of the foreman in running the hand car too fast, up to a point which he knew to be dangerous, and which he did not warn the other men working on the hand car of, so that it was impossible for them, without extreme hazard to their lives, to avoid a collision; or whether the negligence was on the part of the officers in charge of the freight train in approaching a curve in a cut which obstructed the train from view, or passing a public crossing without giving warning by sounding the whistle or engine bell."

To the giving of which said instruction, defendant, by its counsel, then and there excepted, objecting to the submission by the court, to the jury of the question whether the negligence (if any involved), was the negligence of the foreman in running the hand car too fast

up to a point which he knew to be dangerous and which he did not warn the other men working on the hand car of, so that it was impossible for them, without extreme hazard to their lives, to avoid a collision; also objecting to the submission by the court to the jury of the question whether the negligence (if any), was on the part of the officers in charge of the freight train in approaching a curve in a cut which obstructed the train from view or passing a public crossing without giving warning by sounding the whistle or engine bell; because there are no such questions involved by or arising under the pleadings, and that there is nothing in the evidence to justify the submission of such questions by the court to the jury; which said objection was then and there allowed by the court.

That the court further, in that connection, of his own motion, instructed the jury as follows:

"If in any case of these respects there was actual negligence on the part of the defendant, which placed plaintiff in a situation of extraordinary danger, something clear beyond the ordinary risk of his employment, and his injury was not in any degree owing to his own negligence at the time, the defendant would be liable for
101 damages and be liable even though the plaintiff, when in a situation of imminent and apparent danger, may have made a mistake on his part in attempting to escape from the danger, as by attempting to jump in the wrong direction."

To the giving of which said instruction defendant by its counsel, then and there excepted, objecting to the submission by the court to the jury of the question whether there was actual negligence on the part of the plaintiff in any of the respects referred to in the previous instructions hereinbefore mentioned; and objected to the court instructing the jury that if there was actual negligence on the part of the defendant in any of these respects, which placed plaintiff in a situation of extraordinary danger, something clear beyond the ordinary risk of his employment, and his injury was not in any degree owing to his own negligence at the time, that the defendant would be liable for damages; and also objected to the statement made by the court to the jury that the defendant would be liable under any circumstances, even though the plaintiff, when in a situation of imminent and apparent danger, may have made a mistake on his part in attempting to escape from danger, as by attempting to jump in the wrong direction, which said exception was then and there allowed by the court.

That the court further, in that connection, instructed the jury as follows, to wit:

"Even a mistake of that kind, happening at a moment of extreme peril, would not be regarded as a reckless or negligent act on the part of the plaintiff, which would preclude him from recovering damages."

To the giving of which said instruction, the defendant, by its counsel, then and there excepted, which said exception was then and there allowed by the court.

That the court further, upon his own motion, instructed the jury as follows, to wit:

"But if, on the other hand, the injury to him resulted from his own act in attempting to jump from the hand car at a time when it was his duty to have remained on the hand car and assist the others in checking its speed and in removing it from the track so as to get out of the way, and when he had no reasonable cause to regard himself as being in extreme danger, or if defendant was entirely guiltless of any negligence; if the foreman was not guilty of imprudence in running the hand car at the rate it was going; if the freight train did not approach a curve or crossing where it was the duty of the engineer to give warning, so that there was no negligence on the part of the defendant, then your verdict shall be in favor of the defendant."

102 To the giving of which said instruction the defendant, by its counsel, then and there excepted, objecting to the court submitting to the jury the question whether the foreman was guilty of imprudence in running the hand car at the rate it was going; also the question whether the freight train approaching a curve or crossing where it was the duty of the engineer to give warning; for the reason that the questions are not, nor any of them, involved or put in issue by the pleadings, and there is nothing in the evidence to justify their submission by the court to the jury; which said exception was then and there allowed by the court.

That the court further, upon the request of counsel for plaintiff, instructed the jury as follows, to wit:

"If the jury find from the evidence that the hand car in question was a necessary implement in the carrying on of the company's work, and that the said hand car was not sufficiently provided with a sufficient brake to stop it within a proper and reasonable time, when in danger of collision with other trains on said road, of which defect the plaintiff had no knowledge and could not reasonably be required or expected to have such knowledge, and that by reason of such defective brake plaintiff was injured, without contributing by his own negligence to such injury, then the company is liable to plaintiff in damages for such injury."

To the giving of which said instruction, defendant, by its counsel, then and there excepted, objecting to the submission by the court to the jury of the question of the sufficiency of the brake on the hand car, and the question of the knowledge of the plaintiff with regard to the same, for the reason that none of these questions are involved or put in issue by the pleadings, and that there is nothing in the evidence to justify their submission by the court to the jury; that defendant's exception was then and there allowed by the court.

That the court further, upon the request of counsel for plaintiff, instructed the jury as follows:

"If the jury find from the evidence that plaintiff was injured by or on account of the defendant's negligence, to which plaintiff did not contribute by his own negligence, then the fact that negligence of plaintiff's fellow-servants contributed to such injury is no defense to an action by the plaintiff for damages on account of such injury."

To the giving of which said instruction, defendant, by its counsel, then and there excepted, which said exception was then and there allowed by the court.

That defendant, by its counsel, requested the court to instruct the jury as follows:

103 "The jury is instructed that upon all the admissions and pleadings, and all the undisputed facts in this case, the plaintiff is not entitled to recover, and the verdict of the jury should be for the defendant."

Which said request was refused by the court; whereupon the defendant by its counsel excepted to the refusal to give said instruction to the jury, which said exception was then and there allowed by the court.

The following are the instructions as given by the court to the jury:

The court, of its own motion, charged the jury as follows:

GENTLEMEN OF THE JURY: This case is one in which the plaintiff seeks to recover damages for an injury to his person occurring through the alleged negligent acts of the defendant. There are two principal elements of the case which are necessary to support his action. The first is the injury; about that there is no question in this case. The plaintiff has been injured. The second important element is the wrong done by defendant, and it is absolutely necessary for the plaintiff to show by evidence sufficiently to overcome by a fair preponderance in evidence to the contrary that the injury he has suffered is the result of a wrong done by the defendant.

The wrong which is complained of here is the negligence of the defendant in exposing him to danger and causing the injury by failing to observe reasonable precaution, which it was its duty to observe for the protection of this plaintiff and his fellow-workman.

As I said, the burden is on him, if he is going to recover damages, to show that much by evidence, and the evidence must be sufficient to preponderate against what has been introduced to the contrary.

You are exclusive judges of every question of fact involved in this case. You ought to take the testimony of the witnesses and determine from it what the truth is, as best you can. You will be at liberty in weighing this evidence and determining from it what the facts are, to be guided by your experience as men of affairs. Look upon the witnesses, determine from their appearance, manner of behavior on the witness stand, the testimony which they give, as regards its being reasonable and probable, the apparent truthfulness or evasiveness, or inconsistencies in any of its parts; consider all these elements in determining the weight you will give to the witnesses.

You should assume at the outset that the defendant has performed its duty; that its servants and agents are men who would and did perform their duty; that assumption is the basis on which you begin to examine the testimony to see if the evidence shows that they have failed. It is not a controlling assumption but simply a presumption that the defendant has not done wrong, and then,

from that starting point, determine from the testimony in the
104 case whether it is clearly made out that the defendant is guilty of the wrong in the matters complained of.

You will assume that the witnesses are truthful, and that they are equally truthful on both sides, and therefore harmonize their testimony as far as it can be made consistent with what each has sworn to; but when you have come to a point where there is a conflict in a material point, so that you are obliged in order to accept one statement, to reject as untrue another statement, then you should weigh the evidence on each side and determine which is true.

You are not obliged to ascertain what is true beyond a reasonable doubt, as in criminal cases, but determine according to your best judgment in accordance to the greater weight of testimony; that is, if there is testimony on the two sides exactly equal, so that there is no preponderance, you determine contrary to the party whose duty it is to bring proof. If there is anything claimed by the defense which it is necessary for the defendant to prove, and there is no such preponderance, resolve that question in favor of the plaintiff and against the defendant.

The parties have asked for some special instructions, which I will give you before I in general present the precise question, which I think is the one you must necessarily pass upon.

The following instructions requested by the plaintiff were then given by the court:

If the jury find from the evidence that the hand car in question was a necessary implement in the carrying on of the company's work, and that the said hand car was not sufficiently provided with a sufficient brake to stop it within a proper and reasonable time when in danger of collision with other trains on said road, of which defect plaintiff had no knowledge and could not reasonably be required or expected to have such knowledge, and that by reason of such defective brake plaintiff was injured, without contributing by his own negligence to such injury, then the company is liable to plaintiff in damages for such injury.

If the jury finds from the evidence that plaintiff was injured by or account of defendant's negligence, to which plaintiff did not contribute by his own negligence, then the fact that the negligence of plaintiff's fellow-servants contributed to such injury is no defense to an action by the plaintiff for damages on account of such injury.

The court gave the jury the following instructions, requested by defendant:

The jury is instructed that the defendant was not a guarantor of the safety of its machinery or appliances, and was only
105 bound to use ordinary care and prudence in the selection and arrangement and care thereof, and had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe.

The defendant was not and is not bound as an employer to insure the absolute safety of the machinery or mechanical appliances which it provided or provides for the use of its employés; nor was

it bound to supply the best and safest or newest of appliances for the purpose of securing the safety of those who are employed by it.

If the plaintiff knew or had the means of knowing of any defect in the machinery from which the injury is claimed to have happened, and yet remained in the service of the defendant and continued to use such machinery without giving any notice thereof to defendant, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery.

If the plaintiff himself was wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is guilty of contributory negligence, and defendant is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery or appliances through the negligence of the defendant.

You are instructed that it is not only incumbent upon the plaintiff to show that there was a breach of legal duty by defendant, but that the injuries sustained by plaintiff *was* the direct and natural result and consequence of such neglect or breach. Mere surmise and conjecture that the negligence was the proximate cause of the injury is insufficient.

The jury is instructed that the plaintiff, having been at work upon the same section of the road as a section hand continuously for several months, during which time a number of the trains passing over said section were irregular or extra trains, not running on schedule time, and liable to pass over said section at any time, the plaintiff was and is chargeable with notice of the practice of defendant to run such trains, and he assumed the risk incident from the service from that cause.

The court proceeded further to instruct the jury of his own motion, as follows:

To explain this matter a little more fully, it is a principle in all suits to recover damages for negligence, that the plaintiff cannot recover if the injury to himself was in part owing to his own negligence, (or in law contributory negligence), even though there was negligence on the part of the defendant which caused the injury; if that injury was also in part caused by contributory negligence on the part of the plaintiff, plaintiff cannot recover damages.

It is also a principle governing suits to recover damages by
106 employés against the employer, that the employé as a part of his contract of employment, when he goes into the service, assumes on his part the risks and dangers that are ordinarily incident to the service in which he engages. He also assumes on his part that he is competent to perform the service which he undertakes to perform; that he has sufficient knowledge of the tools and implements which he is required to use in the service to know when they are safe and suitable, and to look out for himself against injuries resulting from the use of such tools as are suitable and proper. And it is his duty, if he is handling implements which he knows are unsuitable, to give notice of it to his employer, and a failure on

his part, to perform the duty of giving notice, would absolve the employer from liability for injury resulting from such defect.

I think that the case, when stripped of all the side issues and the identical questions surrounding it, resolves itself into just this question for this jury to determine: Whether the injury to the plaintiff resulted directly from the negligence of the defendant in needlessly exposing him to the danger of being hurt by a collision between the hand car and the extra freight train at the place where it occurred; or, whether the injury was a mere accident which was the result of one of the ordinary hazards of the employment in which he was engaged.

Whether it was an ordinary risk of his employment, or whether an extraordinary danger caused by negligence on the part of the defendant; whether that negligence was the negligence of the foreman in running the hand car too fast up to a point which he knew to be dangerous, and which he did not warn the other men working on the hand car of, so that it was impossible for them, without extreme hazard to their lives, to avoid a collision; or whether the negligence was on the part of the officers in charge of the freight train, in approaching a curve in a cut which obstructed the train from view, or passing a public crossing without giving warning by sounding the whistle or engine bell.

If in any of these respects there was actual negligence on the part of the defendant, which placed the plaintiff in a situation of extraordinary danger, something clear beyond the ordinary risks of his employment, and his injury was not in any degree owing to his own negligence at that time, the defendant would be liable for damages, and be liable even though the plaintiff, when in a situation of imminent and apparent danger, may have made a mistake on his part in attempting to escape from the danger, as by attempting to jump in the wrong direction. Even a mistake of that kind, happening at a moment of extreme peril, would not be regarded as reckless or negligent act on the part of the plaintiff which would preclude him from recovering damages.

But if, on the other hand, this injury to him resulted from
107 his own act in attempting to jump from the hand car at a time when it was his duty to have remained on the hand car and assist the others in checking its speed and removing it from the track so as to get out of the way, and when he had no reasonable cause to regard himself as being in extreme danger; or if the defendant was entirely guiltless of any negligence; if the foreman was not guilty of imprudence in running the hand car at the rate it was going; if the freight train did not approach a curve or crossing where it was the duty of the engineer to give warning—so that there was no negligence on the part of the defendant, then your verdict should be in favor of the defendant.

If within these principles you reach the conclusion that the plaintiff is entitled to any damages, you will fix the amount at what you regard as reasonable compensation to him for the injury complained of. The injury complained of is the physical injury resulting from being run over by the hand car at the time. The

amount is not to be enhanced by any conduct, whether commendable or otherwise, on the part of the railroad company subsequent to that time. For such injuries as are the natural consequence of the accident there at that time is all that the plaintiff can recover.

In fixing the amount, you have the right to take into consideration his expectancy, which was shown to be 38 years and a fraction, and fix upon what you think would be reasonable compensation to him, as near as you can gauge it in money, for the injury which he has suffered. You cannot award any sum in addition to compensation, for the mere purpose of punishing the railroad company, or for what is termed exemplary or vindictive damages. Damages are to compensate the plaintiff, not to punish the defendant; whatever sum you fix upon should be a sum which you, in your judgment, regard a proper amount, and it would be improper conduct for a jury to ascertain what amount they give a verdict for by any scheme involving a resort to a chance verdict. Juries sometimes allow each member to fix an amount which he is willing to give a verdict for and add together and strike an average. Any agreement to resort to that kind of scheme, to render a verdict for a quotient so made, would not be the deliberate judgment of each of the twelve. The amount would be fixed by hazard and would not be a proper verdict. Whatever verdict you fix as damages, if any, should be the amount that you think is the proper amount. This is a case which each juror is required to act reasonably about, and endeavor to come to an agreement—an agreement which shall satisfy the mind and judgment of each of the twelve. It is only your unanimous verdict which can be received, but it is your duty
108 to confer togther carefully and candidly—not to be unreasonable in undertaking to force your own opinion upon others, but to be guided by reason yourself, so as to come to an agreement, such an agreement as will satisfy the conscience of each juror.

In no case can you give the plaintiff more than $25,000, the amount sued for.

Now, at the request of defendant's counsel, this bill of exceptions is settled and allowed, and I, C. H. Hanford, judge of the above-entitled court, do hereby certify that the foregoing bill of exceptions, from pages — 179 inclusive, contains a statement of the facts and all the evidence introduced at the trial and upon which said cause was heard and determined; and that said bill of exceptions contains all the material facts necessary to the determination of any and all questions involved in said cause; and the rulings therein (except such rulings as were entered of record at the time of the occurring thereof) and the instructions to the jury given by the court.

Settled and signed this 5th day of August, 1891.

C. H. HANFORD, *Judge.*

Copy of the above and within bill of exceptions received this 14th day of July, 1891, at Spokane, Washington.

A. K. McBROOM AND
L. H. PRATHER,
Attorneys for Plaintiff.

In the Circuit Court of the United States, Ninth Judicial Circuit for the District of Washington, Eastern Division, Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Petition for New Trial.

Now comes the defendant above named, by Mitchell, Ashton & Chapman, its attorneys, and petitions the court for an order granting a new trial in the above-entitled case, and setting aside the verdict rendered by the jury therein, and for a vacation of the judgment entered therein, upon the grounds and for the reasons following, to wit:

First.

On account of accident and surprise which ordinary prudence could not have guarded against.

Second.

Newly discovered evidence, material for defendant, which
109 it could not with reasonable diligence have discovered and produced at the trial.

Third.

Insufficiency of the evidence to justify the verdict, and that the verdict is against the law.

Fourth.

Error in law occurring at the trial, and excepted to at the time by the defendant.

Fifth.

Excessive damages; the award made by the verdict appearing to have been given by the jury by reason of passion and prejudice, and upon the law and the evidence.

The first and second grounds of the above petition are based upon the affidavits of August Bowman, F. W. Gilbert, W. Moir, W. F. Carson and J. H. Mitchell, Jr., herewith filed and served.

MITCHELL, ASHTON & CHAPMAN AND
HYDE, McBRIDE & ALLEN,
Attorneys for Defendant.

The above and foregoing petition for a new trial having been presented on this 13th day of June, 1891, by J. H. Mitchell, Jr., one of counsel for the defendant named therein, and application having this day been made by said counsel for an order allowing that forty-two days have not elapsed since the date on which the verdict was rendered in said case, and the court being otherwise fully advised

in the premises, and it appearing to the court that this petition for a new trial should be permitted to be filed, it is now and here—

Ordered: That said application for filing be granted, and that the filing of said petition be and now is hereby allowed; and it is further

Ordered: That all proceedings upon said verdict and the judgment entered thereon be and hereby are stayed until the said petition for a new trial shall be heard and determined.

Done at Seattle, Washington, this 13th day of June, 1891.

C. H. HANFORD, *Judge.*

Due and legal service hereby admitted, by receipt of a true copy, this 15th day of June, 1891.

McBROOM, PRATHER & DAUSON,
Attorneys for Plaintiff.

110 In the Circuit Court of the United States, District of Washington, Eastern Division, Holding Terms at Spokane Falls.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Affidavit.

STATE OF WASHINGTON, }
County of Spokane, } *ss:*

August Bowman, being first duly sworn, upon oath, deposes and says:

That he is a white male citizen of the United States, over the age of twenty-one years; that he resides at Spokane, in the county of Spokane, State of Washington, and has resided at said place for more than three years last past continuously; that he is now and has been at all times continuously for the last seven years past in the employ of The Northern Pacific Railroad Company, the above-named defendant, as a locomotive engineer; that he is now and has been for three years last past continuously in such employ as such engineer, on the Spokane and Palouse railroad, a branch of the Idaho division of said defendant's main line, running a locomotive pulling trains from Spokane, in the county of Spokane, State of Washington, to Genesee, in the county of Latah, State of Idaho, leaving Spokane every afternoon, running to Genesee on the same day and arriving back at said Spokane from Genesee on the morning of the following day.

That on or about the 6th day of March, 1891, affiant was granted by M. Moir, master mechanic of said railroad company at Sprague, Washington, a leave of absence for thirty days, with the privilege of thirty days further, if necessary.

That on or about the 6th day of March, 1891, affiant left the said city of Spokane for Sacramento, in the State of California, arriving

at the latter place on or about the 10th day of March, 1891. That owing to the illness of affiant's mother at that place, affiant was not able to leave said place for his home in Spokane, to resume his said work or employment, until the 29th day of April, 1891. That upon leaving said place on said day affiant went directly to Spokane, but did not arrive there until about midnight on the 2d day of May, 1891.

That on August 30th, 1886, affiant was in the employ of said defendant, as a locomotive engineer, and on that day was as such engineer running an engine pulling a special freight train east from Sprague, and was running said engine and pulling said train when the same was rounding a curve about one and one-half or one
111 and three quarters miles from the station of Cheney, on the Idaho division of the defendant's main line of railroad, on said 30th day of August, 1886, when a hand car with section foreman and section hands was approaching from the opposite direction going west. That when affiant first saw said hand car and the men thereon, the said hand car was about one-half mile distant eastward from his engine, and his said engine with his train was then running not to exceed eighteen miles per hour. That immediately upon seeing said hand car and said men thereon, affiant blew the whistle of said engine, giving the alarm signal to the men on said hand car of the approach of said train; and thereafter, seeing that one of the men on said hand car had stepped off in front of said car in the direction in which the same was going, and in stepping off had fallen between the rails, and seeing that the men upon said car were having some difficulty in removing said person and said car from the track, affiant at once proceeded to reverse his engine and slow down the speed of his train, and to do everything possible to stop said train: that when said person stepped off of said car in front thereof, said hand car was more than nine hundred feet distant from said engine; that said person and said hand car were removed from the track by the other men upon said car, before the engine of said train arrived at the place where said hand car was when it stopped; and that said train was brought to a full stop more than thirty feet distant and westward from the point where said hand car was stopped and removed from said track; that said train was not running at a greater speed than eight miles per hour at the time when said person before mentioned stepped off of said hand car; that there was not at or near the place where said hand car was stopped and removed from the track any road crossing or highway over said railroad track, and that there was not, at said time, any road crossing or highway over said railroad track, at or near the curve or cut, around and through which said train was running just immediately prior to the arrival of said train at the place where said hand car was removed from the track, and that there was nothing at or anywhere near said curve or cut, or the place where said hand car was removed from the track, requiring any signal to be given by the blowing of the whistle, or the ringing of the bell of said engine.

That, had affiant been present as a witness on the trial of the above-entitled cause, he would have testified to the facts as herein stated, and will so testify at any trial which may be had of this cause.

AUSTIN BOWMAN.

Subscribed and sworn to before me this 11th day of June, A. D. 1891.

[SEAL.] E. R. YORK,
Notary Public, Residing at ——.

Due and legal service hereof admitted by receipt of a true copy, this 15th day of June, 1891.

McBROOM, PRATHER AND DAUSON,
Attorneys for Plaintiff.

In the Circuit Court of the United States, District of Washington, Eastern Division, Holding Terms at Spokane Falls.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Affidavit.

STATE OF WASHINGTON, } *ss:*
County of Lincoln, }

F. W. Gilbert, being first duly sworn, upon oath, deposes and says:

That ever since the 1st day of April, 1890, he has been and now is the superintendent of the Idaho division of the main line of the Northern Pacific railroad and of all branches thereof, including the Spokane and Palouse branch, running from Spokane, Washington, to Genesee, Idaho.

That August Bowman has been during all of said time, and is now, a locomotive engineer in the employ of said railroad company, running an engine pulling trains over said Spokane and Palouse branch between Spokane and Genesee. That on the 2d day of April, 1891, upon receipt of a letter from Mitchell, Ashton & Chapman, attorneys for said company, requesting information as to the whereabouts, employment and location of witnesses required for the defendant, affiant informed Mr. W. F. Carson, the person who delivered said letter, acting as agent for said Mitchell, Ashton & Chapman and for said company, that the August Bowman mentioned in said letter as being required as a witness was then an engineer on the Spokane and Palouse branch, and could be had as a witness in said case upon a day's notice. That upon the same day affiant received a letter from said Mitchell, Ashton & Chapman, requesting similar information respecting witnesses required
113 in the case of Alexander Young against the same company, among which witnesses the said Bowman was also named;

and that affiant gave to said Carson, who presented said letter, the same information concerning said Bowman as had been given him relative to the above-entitled case. That at said time, said Bowman being regularly employed as engineer upon said Spokane and Palouse branch, affiant supposed that he was then running upon said branch as such engineer; affiant then knowing that said Bowman had not been discharged, but was still in the employ and service of said company, but that affiant did not know at said time that said Bowman had been granted leave of absence, or was then absent from his regular employment or from the State, upon leave of absence. That afterwards, to wit: on or about the 16th or 17th day of April, 1891, at Spokane, affiant, in company with James M. Ashton, one of the attorneys for defendant, and D. G. Lovell, a United States deputy marshal, looked over and examined a list of witnesses as contained in subpœnas which had been issued out of the above-entitled court in the above-entitled cause; and also in the case of Alexander Young *vs.* Northern Pacific Railroad Company; that the name of August Bowman was contained in one of the subpœnas issued in each of said causes; that affiant assured said Ashton and said Lovell that said Bowman was still in the employ of the defendant, running as engineer upon said Spokane and Palouse branch, and could be had upon a day's notice, and that he would undertake to have him on hand at Spokane as a witness at the trial of said causes, upon receiving such notice. That at said time said Bowman was still in the employ of said company, and affiant supposed that he was at that time upon his regular run upon said Spokane and Palouse branch, and did not know that he had been granted or was then off duty or absent from the State upon a leave of absence. That afterwards, on or about April 27, 1891, affiant received from Mitchell, Ashton & Chapman, a letter dated Tacoma, April 25, 1891, notifying him that on Wednesday, April 29, 1891, they would require as a witness on behalf of defendant, at the United States court at Spokane, in the case of Alexander Young against said defendant, the said August Bowman; that affiant, upon receipt of said letter, immediately took steps to have said Bowman attend as such witness at Spokane, and upon directing Mr. M. Moir, master mechanic at Sprague, to relieve Mr. Bowman from duty for that purpose, and to supply another man to fill his place during his absence as a witness, affiant learned for the first time from said Moir that said Bowman had been granted a leave of absence and was then absent somewhere in the State of California.

That affiant then at once made further and diligent in-
114 quiry as to the whereabouts of said Bowman, and ascertained that he was somewhere in California, the exact location not being known, attending at the sick bed of a very near relative, who was then seriously ill; but ascertained also that said Bowman was expected back daily. That on the 29th day of April, 1891, affiant notified John H. Mitchell, Jr., one of the attorneys for defendant, then at Spokane, by wire, that said Bowman was away on leave of absence, but that he was expected back daily, and immediately wrote him at Spokane, under date of May 1st, 1891; that

said Bowman was expected back daily, but that the time of his arrival was uncertain. That notwithstanding careful and diligent inquiry, affiant could not learn when said Bowman left said California to return to this State, but did discover, on or about the 4th day of May, 1891, that said Bowman had arrived at Spokane on or about midnight on the night of the 2d day of May, 1891.

F. W. GILBERT.

Subscribed and sworn to before me, this 11th day of June, A. D. 1891.

[SEAL.] E. R. YORK,
Notary Public, Residing at Tacoma, Washington.

Due and legal service hereof admitted by receipt of a true copy, this 15th day of June, 1891.

McBROOM, PRATHER & DAUSON,
Attorneys for Plaintiff.

In the Circuit Court of the United States, District of Washington, Eastern Division, Holding Terms at Spokane Falls.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Affidavit.

STATE OF WASHINGTON, }
County of Lincoln, } *ss:*

W. Moir, being first duly sworn, upon oath deposes and says:

That for four years last past continuously, he has been and is the master mechanic of The Northern Pacific Railroad Company, the above-named defendant, with headquarters at Sprague, Lincoln county, State of Washington, and having charge of machinery and motive power upon the Idaho division of said company's main line, and the branches operated in connection therewith, and having charge, control and direction of the engineers and firemen employed upon said division and branches, subject, however, to the more general supervision, direction and control of the superintendent of said division and branches.

That August Bowman is now, and has been for more than eight years last past continuously, a locomotive engineer in the employ of said company, running engines pulling trains on the run between Spokane, in the State of Washington, and Genesee, in the State of Idaho.

That on or about the 6th day of March, 1891, said August Bowman was by this affiant granted a leave of absence for the period of no stated time.

That affiant was informed or learned that at or about the time of the granting of said leave of absence, said August Bowman left the State and went to some place in the State of California, not known

to affiant, to attend upon the sick bed of a near relative who was seriously ill. That affiant was afterwards informed and verily believes that said August Bowman's return to his regular employment was delayed by the continued serious illness of said relative.

That on or about the 27th day of April, 1891, when affiant was notified by F. W. Gilbert, superintendent of said division, that said Bowman would be required on the 29th of April, 1891, as a witness for the company at Spokane, and upon receiving directions from said Gilbert then and there to relieve said Bowman for that purpose, and to supply his place with another man, affiant informed said Gilbert that said Bowman had been granted a leave of absence and was then absent, detained in California by the sickness of a relative, but was expected back daily. That it was true at said time, as affiant verily believes, that said Bowman was so detained, but it was also true at said time that he was expected back daily. That affiant then and there made every effort, by diligent inquiry, to ascertain the whereabouts of said Bowman, and to obtain definite information as to when he would return, and did not learn of his return until about the 3d or 4th day of May, 1891, when he learned that Bowman had arrived at Spokane at midnight of the night of May 2d. That affiant did not know, or it did not occur to him at the time, that leave of absence was granted to said Bowman, and at the time that he left this State that he would be required as a witness prior to the time of the expiration of his leave of absence.

W. MOIR.

Subscribed and sworn to before me this 11th day of June, A. D. 1891.

[SEAL.] E. R. YORK,
Notary Public, Residing at Tacoma, Washington.

116 Due and legal service hereof admitted by receipt of a true copy this 15th day of June, 1891.

McBROOM, PRATHER AND DAUSON,
Attorneys for Plaintiff.

In the Circuit Court of the United States, District of Washington, Eastern Division, Holding Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Affidavit.

STATE OF WASHINGTON, } ss:
County of King, }

W. F. Carson, being first duly sworn, upon oath deposes and says: That during the period from April 1, 1890, until June 1, 1891, affiant was continuously in the employ of the Northern Pacific Railroad Company as an attache of the legal department of said company;

having for his employment the duty of looking up and ascertaining the whereabouts of witnesses under the general direction and supervision of J. H. Mitchell, Jr., of counsel for said defendant; that it was the duty of affiant in looking up witnesses, as aforesaid, where such witnesses were understood or believed to be in the employ of said company, to apply to the superintendent of the division upon which they were believed or understood to be employed, for information as to the place of their employment and location, within what time their attendance could be procured, and to ascertain what notice said superintendent would require, and upon what notice they could be procured and their attendance *seemed* at the place and time of trial, and to report to said J. H. Mitchell, Jr., or to the firm of Mitchell, Ashton & Chapman, at Tacoma, the information so obtained from said superintendent.

That on the 31st day of March, 1891, there was delivered to affiant, by J. H. Mitchell, Jr., of the firm of Mitchell, Ashton & Chapman, a number of letters, directed to F. W. Gilbert, superintendent of the Idaho division of the above-named defendant's railroad and of the branches of said division, and signed by said Mitchell in the firm name of Mitchell, Ashton & Chapman, which said letters requested information from said Gilbert relative to the whereabouts and location of witnesses required on behalf of defendant in causes in which defendant was a party in the United States court at Spokane, and which said letters notified said Gilbert that said court would convene at Spokane on or about the 7th day of April, 1891.

117 That among said letters was one relative to witnesses in the above-entitled case, and also one with relation to witnesses in the case of Alexander Young *vs.* said defendant; that the name of August Bowman was in both of said letters designated as a witness required on behalf of said company.

That on the 2nd day of April, 1891, affiant arrived at Sprague, the division headquarters of said Gilbert, and delivered to him the said letters, and called for the information requested therein.

That on said date, affiant and said Gilbert, in said Gilbert's office at Sprague, considered together the various names mentioned in said letters, and as said Gilbert would designate that a certain person was then in the employ of the company, and could be had upon a day's notice, he, the said Gilbert, did in presence of said affiant mark under the said name upon said letter a line in red ink, and did, at the same time, give to affiant personally the information that such person was still in the employ of the company and could be had upon one day's notice.

That such information was given affiant by said Gilbert as to August Bowman in both the above-entitled cases and the case of Alexander Young against said company.

That upon the following day, on April 3rd, 1891, upon arrival at Spokane, affiant made a full report in writing to said Mitchell, Ashton & Chapman, and sent same to them by mail at Tacoma.

That affiant has this day heard read the affidavit of J. H. Mitchell, Jr., herein, and has heard read and examined the exhibits attached to said affidavit, and that the letters attached to said affidavit,

marked Exhibits — and —, are the same letters herein referred to, and the lines in red ink under the names mentioned in said letters, are the lines as made by said Gilbert at said time hereinbefore referred to.

That the exhibit attached to said Mitchell's affidavit, marked Exhibit —, is the original letter of this affiant hereinbefore referred to, containing a report of the information which affiant obtained through conference with said Gilbert, or from all other sources which he had consulted, in the course of a diligent search and inquiry, and that the signature appended to said letter and report is this affiant's original signature.

That affiant also, about three or four days subsequent to the sending of said report, reported in person to said Mitchell, confirming in particular and in detail, the statements contained in his written report.

That after reporting to said Mitchell in person, he was di-
118 rected by said Mitchell to go to the State of Oregon, and find if possible, the person named as Donahue, who was the conductor of the special freight train which was approaching the hand car mentioned in the complaint, at the time of the accident and occurrence mentioned therein. That said affiant, having heard, and having reported to said Mitchell, that said Donahue was believed to be residing at Cross Hollows, in the State of Oregon, under the direction and at the request of said Mitchell, affiant went to the State of Oregon, and made inquiries at, and about, and in the vicinity of said Cross Hollows for said Donahue, and after diligent search and inquiry, affiant was unable to find him, or to get any trace of him, or ascertain his whereabouts or location, and so reported to said Mitchell, shortly thereafter and prior to the time of the commencement of the trial of the above-entitled action.

W. F. CARSON.

Subscribed and sworn to before me, this 13th day of June, A. D. 1891.

[SEAL.] E. R. YORK,
Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.

Due and legal service hereof admitted by receipt of a true copy, this 15th day of June, 1891.

McBROOM, PRATHER & DAUSON,
Attorneys for Plaintiff.

In the Circuit Court of the United States, District of Washington, Eastern Division, Holding Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Affidavit.

STATE OF WASHINGTON, *County of Pierce,* } *ss.*:

J. H. Mitchell, Jr., being first duly sworn, upon oath deposes and says:

That he is and has been at all times during the pendency of this action one of the attorneys for the defendant in the same, and has had at all times during the pendency thereof the charge, direction, and control of the defense of the defendant to said action, and has had general supervision over the matter of ascertaining the
119 whereabouts and location of the witnesses for the defendant, and the procuring of their attendance upon trial of this cause. That affiant is now, and has been ever since the 4th day of November, 1887, a member of the firm of Mitchell, Ashton & Chapman, counsel for said defendant for the States of Washington and Idaho, having headquarters and residing at Tacoma, in Pierce county, in said State of Washington. That during the period from the first day of April, 1890, to the 1st day of June, 1891, continuously, W. F. Carson was in the employ of the Northern Pacific Railroad Company, as an attaché of the legal department of said company, having for his employment the duty of looking up and ascertaining the whereabouts of witnesses under the general direction and supervision of affiant: that it was the duty of said Carson in looking up witnesses under the direction of affiant, where such witnesses were understood and believed to be in the employ of said company, to apply to the superintendent of the division upon which they were believed or understood to be employed, for information as to the place of their employment and location, within what time their attendance could be procured, and to ascertain what notice said superintendent would require, and upon what notice they could be procured and their attendance secured at the place and time of trial, and to report to said affiant, or the firm of Mitchell, Ashton & Chapman, at Tacoma, the information so obtained from said superintendent.

That on the 31st day of March, 1891, affiant wrote a letter to F. W. Gilbert, superintendent of said company's Idaho division and the branches thereof, to which said letter was appended the signature of said firm of said Mitchell, Ashton & Chapman, signed by affiant, and which letter notified said Gilbert that said firm had sent by said Carson a number of letters calling for information as to the location of witnesses, and other necessary data for use in the United States court, which would convene in Spokane on the 7th of April, 1891, a copy of which said letter is hereto attached, marked "Exhibit A," and made a part of this affidavit.

That on the same day, and under the same date, affiant wrote a letter to said Gilbert, signed in the same way, and forwarded same by said Carson to said Gilbert at his headquarters in Sprague, Lincoln county, State of Washington, calling for definite information as to the whereabouts of certain witnesses required in the above-entitled case, and enquiring particularly in relation to the whereabouts of August Bowman, supposed to be running on the Spokane and Palouse branch of the Idaho division as an engineer;
120 the original of which said letter is hereto attached, marked "Exhibit B," and made a part of this affidavit.

That on the same date affiant also wrote a similar letter to said Gilbert, similarly signed, and forwarded same by said Carson to said Gilbert, inquiring as to the whereabouts of witnesses required in the case of Alexander Young *vs.* same defendant, pending for trial and to be tried at the term of the United States court to convene at Spokane on April 7, 1891, and particularly naming in said letter the said August Bowman as a witness required on behalf of said defendant in said case. The original of which said letter is hereto attached, marked "Exhibit C," and made a part of this affidavit. That on the 2d day of April, 1891, the said letters designated as Exhibits "B" and "C" were personally delivered by said Carson to said Gilbert at the headquarters of the latter in said town of Sprague, and on the same date the letter designated as Exhibit "A" was also delivered to said Gilbert at said place.

That on or about the 4th day of April, 1891, affiant received at Tacoma, by mail through the post office from said W. F. Carson, a letter dated at Spokane, April 3, 1891, giving a report of the information he had obtained relative to the whereabouts and location of the various witnesses required in behalf of defendant on the trial of the various cases mentioned therein, to be tried at the term of the United States court about to convene at Spokane, including among others such information in the above-entitled case, and also in the case of Alexander Young *vs.* said company, in relation to each of which said cases the name of August Bowman was mentioned as being an engineer on the Spokane and Palouse branch, and giving the information that said Bowman could be had upon one day's notice; that the original of said letter is hereto attached and marked Exhibit "D," and made a part of this affidavit.

That said term of said court did not regularly convene until the 14th day of April, 1891; that upon the convening of said court, the above-entitled cause was assigned upon the trial calendar to come on for trial on the 30th day of April, 1891; that the cause of Alexander Young *vs.* said company, was by said assignment set for trial on the 29th day of April, 1891. That on the 15th day of April, 1891, affiant caused a subpœna to be issued out of the above-entitled court for witnesses upon behalf of the defendant, to appear in said cause in said court upon the 30th day of April, 1891, at 10 o'clock a. m.

That, among others, the name of August Bowman was contained in said subpœna, as per a certified copy of said subpœna,
121 which is hereto annexed and marked Exhibit "E," and made a part of this affidavit.

That upon said subpœna being issued it was delivered to D. G. Lovell, deputy United States marshal, and under direction of this affiant said F. W. Gilbert, superintendent aforesaid, and James M. Ashton, one of the attorneys for defendant and a member of the firm of Mitchell, Ashton & Chapman, met with said D. G. Lovell, in the city of Spokane, on the 16th day of April, 1891, for the purpose of furnishing said Lovell with information as to where said witnesses named in said subpœna could be found and within what time their attendance could be procured, it being the intention of this affiant that said Gilbert should inform said Lovell as to which of said witnesses were in the employ of said company, and whose attendance could be procured by said Gilbert upon one day's notice to him. That affiant is informed that said Gilbert at said time assured said Lovell that said Bowman was in the employ of said company with headquarters at Spokane, and could be had upon one day's notice.

That affiant is also informed by said Gilbert, and verily believes it to be a fact, that said Gilbert supposed at said time, and had every reason to believe, that said Bowman, who was still in the employ of said company, was upon his usual run and engaged upon his usual work, being in the city of Spokane every day in the course of running his train in and out of the same.

That upon the 25th day of April, 1891, affiant wrote a letter under that date, at Tacoma, to said Gilbert at Sprague, which said letter was signed by affiant in the firm name of Mitchell, Ashton & Chapman, and mailed through the post office at Tacoma to said Gilbert, which said letter said Gilbert received on or about the 27th day of April, 1891.

That said letter notified said Gilbert that on Wednesday, the 25th day of April, 1891, the said Bowman would be required as a witness at Spokane, in the case of Alexander Young against said company, a copy of which said letter is hereto attached, marked Exhibit "F," and made a part of this affidavit.

That on or about the 30th day of April, 1891, affiant received at Spokane, where he was then engaged in the trial of said Young case, a telegram from said Gilbert, sent from Sprague, notifying him that said Bowman was away upon a leave of absence, but was expected back daily; the original of which said telegram is hereto attached, marked Exhibit "G," and made a part of this affidavit.

That on the 1st day of May, 1891, while still engaged in
122 the trial of said Young case, affiant sent from Spokane a telegram to said Gilbert, notifying him that his telegram was the first intimation that affiant had that said witness Bowman was not upon his regular run and would not be on hand as a witness, and notifying him that he was badly in need of the presence of said Bowman; a copy of which telegram is hereto attached, marked Exhibit "H," and made a part of this affidavit.

That on or about May 1, 1891, and just about the time of the sending of the telegram last above mentioned, affiant received at Spokane a letter from said Gibert, dated at Sprague, May 1, 1891, confirmatory of the telegram already sent by said Gilbert and re-

ceived by affiant, notifying affiant that said Bowman was absent upon a leave of absence, but was expected back daily; the original of which said letter is hereto attached, marked Exhibit "I," and made a part of this affidavit.

That on the same day, to wit, May 1st, 1891, the trial of said Young case having been concluded, and the trial of the above-entitled cause having been entered upon, affiant sent a telegram at Spokane to said Gilbert at Sprague, notifying him of the completion of the Young case, of the commencement of the trial of the above-entitled cause, and stating that said Bowman was badly needed as a witness in said cause, and that if he had arrived to have him come at once to Spokane; a copy of which said telegram is hereto attached, marked Exhibit "J," and made a part of this affidavit.

That the trial of this cause was proceeded with during the 2d day of May, 1891, and the taking of testimony was finished upon said 2d day of May.

That on the morning of the 4th day of May, being Monday, the argument to the jury was commenced, and was still in progress at the noon intermission upon said day, during which said intermission affiant learned for the first time that said Bowman had arrived in said Spokane about midnight on the night of Saturday, the 2d day of May, 1891.

That during the trial of said Young case, and before commencing upon the trial of the above-entitled case affiant was busily engaged in court, but was during said time forwarding telegrams along the line of defendant's road inquiring whether said Bowman was anywhere upon the same, and was in other ways making inquiries as to his whereabouts, but could learn nothing concerning it at said time.

That during the taking of the testimony in the above-entitled case, affiant was still diligently prosecuting said search and in-
123 quiry, but without obtaining any information as to the whereabouts of said Bowman.

That when affiant had finally learned of the arrival of said Bowman in Spokane, the said cause had proceeded too far for the introduction of the testimony of said Bowman.

That the testimony upon behalf of the plaintiff in the above-entitled case to the effect that there was a road or highway crossing the defendant's track at or near the cut or curve where the accident mentioned in the complaint is alleged to have taken place, and that the engineer of the special freight train approaching around said curve through said cut from the direction towards which the hand car mentioned in the complaint was being operated, did not blow the whistle of his engine, or give any alarm of the approach of his train to and over the said crossing, was a surprise to the defendant and this affiant, as nothing had been alleged in the complaint concerning any such matters, and no notice given to defendant prior to the trial, or upon the trial prior to the submission of such testimony, that any such facts would be relied upon, and in the absence of the engineer of said train he had no means of meeting said proof, and that affiant was then too busily engaged in the trial of said cause to

set on foot or prosecute the inquiry to obtain proper witnesses to disprove said facts, or to in any way meet said proof.

That the taking of testimony in the above-entitled cause was not commenced until the morning of the 2d day of May, 1891, and was concluded before the expiration of said day, and affiant had no opportunity to meet the proof made in that regard. That the said August Bowman was the engineer of said special freight train at the time and place of the accident and occurrence mentioned in the complaint, and would have testified upon the trial of said cause, had he been present as a witness for the defendant. That there was at said time no road or highway crossing over said railroad track at or anywhere near said cut or curve, or the place of said accident, or occurrence mentioned in said complaint, and he will so testify, and affiant and defendant expect to prove by said Bowman upon the event of any subsequent trial of this case, that there was no such road or highway across said defendant's track at or anywhere near said cut or curve, or the place of said accident or occurrence.

That said Bowman would also have sworn and testified, if he had been a witness upon the trial of said cause, that his said train stopped more than thirty feet distant from and westward of, and before reaching the place where the said plaintiff fell from, or got off from said hand car, and the point from which said hand car was re-
124 moved from said track, and never did pass by said point until after it was started up again after the said hand car and the said plaintiff had been removed from said railroad track. And the said Bowman will testify, and affiant and said defendant expect to prove by said Bowman, upon any subsequent trial, that may be had of said cause, that said train did so stop, as hereinbefore stated. And affiant further says that when informed by the letter of said Carson, hereto attached, that one Donahue, who was the conductor of said special freight train at said time, was reported and believed to be at a place called Cross Hollow, in the State of Oregon, he directed said Carson to go to the State of Oregon and find said Donahue, and procure, if possible, his attendance at the trial, or ascertain his location and whereabouts so that his deposition might be taken.

That said Carson, in response to said request and direction, went to said State of Oregon, and made inquiries at and about said place known as Cross Hollows, as to the whereabouts of said Donahue; but after diligent search and inquiry, as affiant is informed and verily believes, said Carson was unable to locate or find said Donahue, and so reported to this affiant prior to the commencement of the trial of this cause.

That said Donahue left the service of said company several years ago, and prior to the commencement of this action, and his whereabouts have not been known to affiant or the representatives of defendant since the time of his leaving said employment, and after diligent search made by this affiant and other agents and representatives of the defendant, it has not been possible to find the said Donahue, or obtain any information as to his whereabouts.

That affiant prior to the time of the trial of this cause, made dili-

gent search and inquiry to ascertain the whereabouts and location of the other employés engaged as servants of said company on board said special freight train at the time of said accident, in addition to said conductor and engineer, hereinbefore referred to; but, after diligent search and inquiry during all the time that said action was pending down to the time of trial, affiant was unable to ascertain the whereabouts of said persons, they having left the service of said company prior to the commencement of this action.

That there was not at the time of said trial any one known to affiant or the said defendant, except said engineer, August Bowman, who knew of or could testify to the facts with regard to the movements of said train at the time of said accident, and the facts hereinbefore referred to as being those which said Bowman would have testified to on the trial of said cause, and those which he will
125 testify to in the event of any subsequent trial of said cause, and in the absence of said Bowman the said evidence was not obtainable.

J. H. MITCHELL, JR.

Subscribed and sworn to before me, this 13th day of June, A. D., 1891.

[SEAL.] E. R. YORK,
Notary Public in and for the State of Washington, Residing at Tacoma, in said State.

Due and legal service hereof admitted, by receipt of a true copy, this 15th day of June, 1891.

McBROOM, PRATHER & DAUSON,
Attorneys for Plaintiff.

COPY EXHIBIT "A."

Northern Pacific Railroad Company, Western division, legal department.

TACOMA, WASH., *March* 31, 1891.

Mr. F. W. Gilbert, superintendent, Sprague.

DEAR SIR: We send by Mr. Carson a number of letters calling for information as to the location of witnesses, and other necessary data, for use in the U. S. court which convenes in Spokane on the 7th of April. Should there be any information asked for which you cannot definitely give Mr. Carson from your records, or which he may not be able to obtain by personal investigation, and you should consequently obtain same, please send same to the address of either Mr. Mitchell or Mr. Ashton, care Agent Tinling, Spokane Falls, and oblige,

Yours truly, MITCHELL, ASHTON & CHAPMAN.
M. PH.

EXHIBIT "B."

Northern Pacific Railroad Company, Western division, legal department.

TACOMA, WASH., *March* 31, 1891.

Mr. F. W. Gilbert, superintendent, Sprague.

DEAR SIR: On August 29, 1890, we wrote you as follows: "There is pending in the U. S. court which convenes in Spokane Falls next Tuesday the case of Hugh Charless *vs.* the company. This man claims that on the 28th day of August, 1886, he was a sec-
126 tion hand on section west of Cheney under W. C. Kirk as section foreman.

That on that date the section crew went out with the hand car; that the operator at Cheney failed to notify him of train going against them and proceeding east; that hand car was defective in not being provided with proper brakes; that while section foreman was on rear of car looking west, and he, Charless, was on the front of the car, facing east, with his back towards the direction towards which they were going, that section foreman called out when near a deep cut on the curve, for the first time, that a certain train was about due; and immediately after exclaimed 'There she is now;' that Charless who was working the lever became frightened, turned around to see what danger he was in, fell off or undertook to jump off, his clothing caught in the car and he could not extricate himself, the car ran over him but the car and all were pulled off the track before the train came along. He suffered for a long time with paralysis in the lower part of his body and is still so suffering.

"He also claims damages on account of the failure to give him proper medical and surgical attention and treatment while he was in the hospital at Missoula. The persons upon the car and in the section gang besides himself and Foreman W. C. Kirk, were Wm. Pawson, Wm. Tunley and T. Kirrell. The physician called at the time of the accident was Dr. Pomeroy of Cheney. Please furnish with a statement of the whereabouts of the persons named and how and when they can be reached."

On August 30th you replied to this letter as follows: "Replying to yours of Aug. 29th, relative to the case of Hugh Charless *vs.* the company, the persons named in your letter Foreman W. C. Kirk, Wm. Pearson, Wm. Tunley and C. H. Kirrell I have been unable to locate. You remember this information was called for some time ago and a vigorous effort made on my part to locate these parties, but without success. The physician, Dr. Pomeroy, is still at that point and he can be had as a witness at any time. I have this day written Dr. Pomeroy advising him that you are liable to call on him as a witness in this case."

You supplemented the information given in your letter by a telegram on Sept. 24th, to the effect that Conductor Donahue here had charge of the extra that struck the hand car near Cheney on August 30th, not 31st, and August Bowman, now running on the S. & P.

branch was engineer. You also state that Donahue had not been in the service for several years and his whereabouts was unknown.

Please let us know whether Donahue has been found and
127 what is the present location of Bowman; also whether any of the train crew other than these two are in the service, and where they can be found.

One of the section gang mentioned in the letters referred to was located by our Mr. Mitchell at the last term of court as a party kept in hiding somewhere by the opposite party, but he was never able to ascertain which one of the men it was. Mr. Mitchell also located one of the men he thinks, W. C. Kirk, the section foreman—either at Colville or Marcus, and reached him by process of court, and had an interview with him at Spokane. He was keeping a saloon at some point on the Spokane & Northern. M. V. Massey, who was roadmaster at the time of the accident knows him very well and will probably remember which man it was. We would like if possible to locate him again.

Yours truly, MITCHELL, ASHTON & CHAPMAN.

EXHIBIT "C."

Northern Pacific Railroad Company, Western division, Tacoma, Wash.

MARCH 31, 1891.

Mr. W. F. Gilbert, superintendent, Sprague.

DEAR SIR: On August 28, 1890, we wrote you the following letter: "The United States court convenes at Spokane Falls next Tuesday. There is pending there the case of Alexander Young *vs.* the company. In December, 1888, Cond'r D. Crowley had trouble with this man Young on train 22 of that date. He would not give up his ticket or pay fare; gave a ticket from Oakesdale to Spangle, but did not get off at the latter place. Had another fuss with Crowley, fired a shot and walked around the car with a revolver in his hand, and afterwards boasted of having frightened the conductor and brakeman. February 5th, on trip from Spokane, refused to give up ticket or pay fare, and as car was full of ladies and children Crowley concluded it was best to let him go through. He stopped over at Marshall and on Feb. 6th boarded the train for Oakesdale, boasting that he would go to that point for nothing or whip the conductor. When asked for his ticket produced one which he should have given up the day before. Was informed that it did not give him any stop-over privileges. Refused to pay. Train was stopped and effort made to get him off. He turned and made it lively for Crowley, when Tim. Reardon, at that time a discharged con-
128 ductor traveling on the train, got in some effective work on Young, being ably assisted by Tom Garvin, another discharged conductor, who was traveling the same way.

"We would like to be informed of the present whereabouts and employment of Mr. Crowley, then conductor of the train in question, and also of the following: J. R. Marshall, then agent at Marshall

Junction; Mrs. B. C. Winston, wife of agent then at Belmont, also her son; Dr. Baker, an old man then at Oakesdale; the person who was then agent at Oakesdale; C. C. McEachran; O. K. Horne, then agent at Rosalia; Frank Bonner, then freight conductor on main line, and V. E. Ford, brakeman on S. & P.; also would like to know the whereabouts of Peter E. Lynn, who lived at Marshall; also the party who was formerly the newsboy on train by name of Charles Goddard, then living at Oakesdale," etc.

To this letter you replied as follows, under the date of August 30th:

"Replying to yours of August 28th, relative to the case of Alexander Young *vs.* this company, Cond'r Dan. Crowley at last accounts was employed on the U. P., running out of Spokane Falls. I have wired ass't sup't at Tekoa, asking his whereabouts. Will advise you of this later. J. R. Marshall is still agent at Marshall Junction and can be had at any time. Mrs. B. C. Winston, wife of the former agent at Belmont, is now at San José. C. C. McEachran is still agent at Oakesdale. A. K. Horn is still agent at Rosalia. Frank Bonner is a conductor on the main line and can be had on two days' notice. V. E. Ford is now proprietor of the Crescent lodging-house at Spokane Falls. Chas. Goddard, the newsboy on the train, died recently at Spokane Falls. I will endeavor to procure information as to the whereabouts of S. E. Lynn, of Marshall, and advise you later. Dr. Baker is still living at Oakesdale."

We require in addition to the information sought in our letter referred to, particulars as to the whereabouts of the following witnesses at the former trial of this case, and not named in the letters above: Gus Bowman, who at last term of court was on the S. & P. run; John F. Bailey, who we believe was also on the same run. We understand that Henry Albert, who was a witness on the former trial, was killed in an accident on the S. & P. Are we correct in this? Tim. Reardon we understand to be on construction at Moscow, and we will endeavor to reach him through the construction dep't. We are informed by Sup't Holcomb of the U. P., that D. Crowley is running as conductor for the U. P. out of Tekoa. Mr. Holcomb says he can be had whenever request is made through the proper channel. Please notify Mr. Holcomb that Crowley
129 will be wanted as a witness at Spokane during the coming term of court, and arrange so that he can be had upon notice of a day or two from your office. The exact time of his being required, as near as possible, will be made known to you by us. We would like to know also the whereabouts of Ed. Harris, a man who was on the train at the time of the occurrence mentioned in our former letter, and who was at that time a traveling salesman for some liquor house in Portland. If anything has ever been ascertained about the location of Peter E Lynn, mentioned in former letter, let us know. We would also like to know the names of the brakeman and baggageman on board the train mentioned, their present location and where they can be reached.

Yours truly, MITCHELL, ASHTON & CHAPMAN.

EXHIBIT "D."

SPOKANE, WASH., 4, 3, '91.

Messrs. Mitchell, Ashton & Chapman, Tacoma, Washington.

GENTLEMEN: Pursuant to your instructions I herewith report of progress made in the securing of witnesses in the Hugh Charless case, to wit: W. G. Kirk, section foreman, who is wanted in this case, I have been unable to locate, having wired from this point to the end of the Central Washington branch, also on the Spokane and Northern, following pointers that I had received on the side as to his whereabouts, yet all of it has failed to bring to light this important witness. There is one consolation; if we cannot find him the opposite side are in the same boat should they want him.

Wm. Pawson, Wm. Tunley, T. Kirrell, other members of the gang which he was working with, are unknown quantities, as far as locating them is concerned. I have been unable to get even a clew to these gentlemen. Dr. Pomeroy, a resident of Cheney, is still there and can be had on a day's notice. August Bowman, engineer of Spokane and Palouse branch can be had also on a day's notice. Conductor Donahue, a very important witness in this case, an exemployé of this road, can be found at Cross Hollows, Oregon, a point off the line of railroad, six miles from The Dalles, and reached by stage daily, except Sunday. If you think it necessary that he should be subpœn-ed, perhaps it would be well that I should go to The Dalles and look him up. I shall await further instruction from you
130 regarding this witness. This covers the Charless case as far as witnesses are concerned, and completes the list which you handed me.

Case No. 2.

That of Fredonia Herndon, widow of Geo. W. Herndon, Conductor Pegram, Engineer Morris Better, Fireman Jas. Stevens, Brakeman W. H. Brooks and Rillie Harboard, Engineer C. Simonds, Fireman Dave Jones can be had in a day's notice by wiring Sup't Gilbert. There are the following-named gentlemen required as witnesses who I am unable to locate: John Buckley, foreman of switch-engine, also Pat. Sullivan, one of the yardmen, and Jos. F. Lowe of the freight department, and the long-looked-for Anna or Emma Woods—there seem to be doubt as to her first name. W. H. Brooks, brakeman, above referred to, left St. Paul yesterday and will report in time for trial. This completes the list of witnesses required, as handed me by yourself, in the Herndon case.

I have conversed with Harboard the brakeman; he seems to have a pretty clear recollection of the affair and seems disposed to give his evidence in such manner as to help our case along. This closes the Herndon case.

Case No. 3. That of Peter Anderson.

It seems difficult to get even a few of the witnesses mentioned in this case. Engineer S. J. McEllicott, Fireman J. H. Clark are still with the company and can be had on two days' notice; T. F. Wil-

son, with whom I am now in communication, with Sup't Dorsey of the Union Pacific in Cœur d'Alene district, and hope to be able to furnish evidence of his whereabouts before trial comes up. R. B. McClelland—we have lost track of him at this end of the road also; you referred to him in your letter as being in Tacoma, perhaps you might get a hold of him at that point. Engineer McEllicott, I suppose, is the same gentleman referred to as being in Tacoma. Scott Thompson, formerly of Sprague, we have been unable to locate. He seems to belong to that drifting element known as the "traveling brakeman." Dr. W. H. Olds can be had at Sprague. Conductor Wilson, I have learned since dictating this letter, is now with the Union Pacific, on Spokane division; I will look him up this afternoon.

Case No. 4, that of John F. Renner.

I am able to report to you favorably that Hallett, engineer, can be had at a day's notice; also Mr. Clark, the crossing watchman states that he personally told Mr. Renner not to cross the track, that it was not safe, and he forbid him from doing so. This information I get from Mr. Gilbert, sup't. Jos. Desnoid, night yardman
131 at Spokane, can also be had on a day's notice. The witnesses in this case are limited, but I think we have enough of them in sight to protect our case. I still keep this case before me, making such inquiries as may lead to the whereabouts of some of the unknown witnesses.

Case No. 5, that of Alexander Young.

Dan. Crowley, conductor, is now running on U. P. from Tekoa to Cœur d'Alene city, and extra into Spokane. Can find him on a day's notice, and Mr. Gilbert wired Sup't Holcomb asking permission to relieve Mr. Crowley in case we wanted him as a witness. We also can procure J. R. Marshall, agent at Marshall Junction; Mrs. B. C. Winston, wife of agent at Belmont, also Dr. Baker, of Oakesdale; also Agent C. C. McEachlem, also A. K. Horn, agent at Rosalia; Frank Bonner, freight conductor; also Mr. E. Ford, now resident of this city, can also be had at short notice. Charles Goddard, newsboy on the train, has since died. Gus Bowman, running on the Spokane and Palouse branch; John F. Bailey I believe is on the same run. Can both be had.

Case No. 6, that of Clark Long.

Brakeman N. C. Nillson, F. W. Swartz, agent, Dr. Burrows, attending physician, now a surgeon at Ritzville, and Mr. Grippman, can all be had at a day's notice. I had a long conversation with both Mr. Goddard and Mr. Burrows. Their evidence will go a great way toward making a good case for us. Mr. French, now assessor of Adams county, was not in city, but out in rural districts assessing property. I have left word to have him come to Spokane as early as convenient that I may notify him and hand him annual transportation as assessor with request that he use it on this occasion also. The general feeling in Ritzville regarding this case is favorable to the company. Conductor Pelliter is somewhere in Texas or Mexico and is a hard party to locate. Brakeman N. C. Nillson is still running on the Idaho division and can be had on

two days' notice. Brakeman Morrison is not in employ of the company and his whereabouts are unknown. Engineer Melcher was killed last winter in accident Central Wash.

This is all the information on the Long case that I am able to afford up to the present moment. I forward it to you in order that you may advise me of any other witnesses that you may have heard of and that you wish looked up. I shall remain here until otherwise instructed by you, working diligently on the several cases before me and hope to be able to have additional witnesses ready in time for trial.

132 Please address me C. O., city ticket agent, Spokane Falls.

Yours truly, W. F. CARSON.

EXHIBIT "E."

UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Circuit, District of Washington.

HUGH CHARLESS
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY. } No. 9. (Seal.)

The President of the United States of America to —— Donahue, Wm. Pamson, August Bowman, Dr. Horton, Greeting:

You are hereby required, that all and singular business and excuses being set aside, you appear and attend before the circuit court of the United States for the ninth circuit, district of Washington, to be held at the court-room of said court in the city of Spokane Falls on the 30th day of April, A. D. 1891, at 10 o'clock a. m., then and there to testify in the above-entitled cause, now pending in said court, on the part of the defendant, and you are not to depart the court without the leave of the court. And for a failure to attend, as above required, you will be deemed guilty of contempt of court and liable to pay to the party aggrieved all loss and damages sustained thereby.

Witness the Honorable Melville W. Fuller, Justice of the Supreme Court of the United States and the seal of said court, this 15th day of April, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and fifteenth.

[SEAL.] A. REEVES AYERS, *Clerk*,
By S. A. WELLS, *Deputy Clerk*.

EXHIBIT "F."

Copy.

Northern Pacific Railroad Company, Western division, legal department, Tacoma, Wash.

APRIL 25, 1891.

Mr. W. F. Gilbert, superintendent, Sprague.

DEAR SIR: On Wednesday the 29th inst. we will want J. R. Marshall, agent at Marshall Junction, Frank Bonner, now conductor,

Gus Bowman, engineer, and John F. Bailey, foreman, at the United States court at Spokane in the Young case. They should report to our Mr. Mitchell at the Spokane hotel, Wednesday noon. Would like to have C. C. McEachran report to our Mr. Mitchell at the Spokane hotel on Tuesday evening the 28th, as we need from
133 him necessary information in order to determine what other witnesses, if necessary, we should summon. Please attend to this, and oblige.

Yours truly, MITCHELL, ASHTON & CHAPMAN.

M. PH.

EXHIBIT "G."

280, 53*a*. P. J. N.

From Sprague 29 to J. H. Mitchell, Jr. Dated April 29, 1891. At Sprague. J. R. Marshall, former agent Marshall Jct. will report to you tomorrow morning. Cond'r Bonner, Fireman Bailey, Eng'r Bowman are away on leave of absence. They are expected back daily.

F. W. GILBERT.

EXHIBIT "H."

Copy of Telegram.

Northern Pacific Railroad Company, Western division, legal department, Tacoma, Wash.

SPOKANE FALLS, *May* 1, 1891.

F. W. Gilbert, Sprague:

Your telegram just rec'd. First intimation I have had that Bowman, Bailey and Bonner were not on their regular runs and would not be on hand as witnesses. We have already started trial of Young case and need them badly. Was relying upon their being here and reporting to me yesterday.

J. R. MITCHELL, JR.

EXHIBIT "I."

Northern Pacific Railroad Company, office of division superintendent.

SPRAGUE, WASH., *May* 1, 1891.

J. H. Mitchell, Jr., Spokane.

DEAR SIR: I am advised that subpœnas have been issued for the appearance of W. H. Brooks at the U. S. court at Spokane Falls on May 13th. This man is now living in Spokane Falls and has not been in the service of the company for some months; he was recently injured at Pasco. Cond'r Pegram and Engineer Vetter together with Fireman James Stevens will be on hand at the appointed time. Conductor Frank Bonner and Engineer Gust. Bowman have been away from the division for some months on leave

of absence; they are expected back daily, but the time of their arrival is uncertain.

Yours truly, F. W. GILBERT, *Sup't.*

134 EXHIBIT "J."

Copy of Telegram.

Northern Pacific Railroad Company, Western division, legal department, Tacoma, Wash.

SPOKANE, *May* 1, 1891.

F. W. Gilbert, Sprague:

Just got through with Young case and won it without Bowman or Bailey. Have also started on Charless case in which Bowman is also very badly needed. If he has arrived send him right up.

J. H. MITCHELL, JR.

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Washington, Eastern Division, Terms at Spokane Falls.

HUGH CHARLESS, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The motion for a new trial and to set aside the verdict and for vacation of the judgment in the above-entitled action having been heard and determined this day, upon application of the defendant by its counsel for the fixing by the court of the amount of the security to be given by defendant to operate as a supersedeas herein, and the fixing of a period of time within which there should be a stay of proceedings herein pending the giving of said bond, it is now and here ordered by the court that the amount of said security be and hereby is fixed at the sum and amount of twenty-five thousand dollars, and that the period of sixty days from this twenty-second day of September, 1891, be and hereby is fixed as the time within which there shall be a stay of proceedings pending the giving of said bond.

C. H. HANFORD, *Judge.*

In the United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error.
No. —. Petition for Writ of Error.

To the Honorable C. H. Hanford, judge of the circuit court of the United States for the district of Washington:

135 Your petitioner, The Northern Pacific Railroad Company, would respectfully represent that in the United States circuit court of the ninth judicial circuit, for the district of Wash-

ington, eastern division, holding terms at Spokane in the State of Washington, on May 11, 1891, in the case wherein Hugh Charless was plaintiff and The Northern Pacific Railroad Company was defendant, judgment was rendered in favor of said plaintiff and against said defendant, for the sum of $18,250, and for costs. That subsequently on the 13th day of June, 1891, all proceedings were stayed upon said judgment by order of said court, upon the allowance by said court, and the filing by said defendant on said day of a motion for a new trial; said order as so made requiring the stay of said proceedings until the hearing and determination of said motion for a new trial; that subsequently, to wit, on the 22d day of September, 1891, said motion for a new trial was heard by said court, and upon said day an order was made by said court denying the same and making effective thereby the said judgment rendered as aforesaid. That also upon said date an order was made by said court staying all proceedings upon said judgment for a period of sixty days from said date, and fixing said period of sixty days as the time which should be allowed and given for the giving of a bond to operate as a supersedeas upon any appeal which might be taken in said cause. And your petitioner now prays that it may be allowed to have and prosecute a writ of error to the United States circuit court of appeals for the ninth judicial circuit at the city of San Francisco, in the State of California, for the reversal of the judgment rendered in said above-entitled action by the court above mentioned.

And your petitioner will ever pray.

MITCHELL, ASHTON & CHAPMAN,
Attorneys for Northern Pacific Railroad Company,
Plaintiff in Error.

In the United States Circuit — of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error. } No. —.

Of —— term, in the year of our Lord one thousand eight hundred and ninety-one.

Now, on the -- Monday of ——, in this same term, before the judges of the United States circuit court of appeals for the ninth circuit, in the city of San Francisco, comes the said Northern Pacific
136 Railroad Company, by Mitchell, Ashton & Chapman, its attorneys, and says that in the record and proceedings in the cause entitled Hugh Charless, plaintiff, *vs.* Northern Pacific Railroad Company, defendant (being the same cause as herein first above entitled), before the judge of the United States circuit court of the ninth judicial circuit, for the district of Washington, eastern division, holding terms at Spokane, in the State of Washington, there is manifest error in this, to wit:

First. That the complaint of plaintiff, as the same was by said court allowed to stand for trial, did not state facts sufficient to constitute a cause of action, and that defendant's demurrer thereto should not have been overruled.

Second. That the statement made in narrative form by plaintiff, as a witness in his own behalf, without being specially interrogated by his counsel or any one, in reference to any particular matter involved in said cause, which said statement was made in such a way as to afford defendant no opportunity of making any objection to any particular portion thereof, and which was allowed to be made over the general objection of defendant thereto, contained matters immaterial to the issues involved in said cause, and incompetent as being hearsay and not the best evidence. That the objections of said defendant to said statement, upon said grounds should have been sustained by the court, and the court should not have denied defendant's request for the court to direct counsel for plaintiff to specially interrogate the plaintiff in respect to such matters as were desired to be elicited from plaintiff, or be shown by plaintiff on his own behalf, as evidence in the case, and said immaterial and incompetent evidence contained in said statement should not have been admitted.

That the first part of said statement, as objected to by defendant (as will appear by the testimony contained on page 2 of the bill of exceptions in this cause), was as follows, to wit:

"I was hired out to the Northern Pacific section foreman some time in the month of May, 1886. I worked for him until some time close on July; moved up to Idaho, and they put us to another foreman named Kirk. During the time when Kirk came there he was sick. They got another man who was foreman some days before Kirk took charge. When I worked for the first foreman we had a car there which was my first section-work. I had worked on right-of-way and timber work, etc. When I went to work we had a car there, and the brake we had for it was a stick. There was a jack that they used to raise the track; it is over fifty pounds solid bunch of iron, with an arm to raise the track. We used to raise the track with this, and the stake we used to stick into it, we
137 used to use that for a brake. When he wanted to stop the car he would stick it into the spoke and stop the car. We used it until Kirk became our foreman. One day after Kirk became our foreman a train was coming after us. Kirk never attended to this himself; he left it to some man or any man, and the man that was using it that day tried to put it in, but in place of doing so he hit the spokes and they knocked it out of his hand. We had a great time to stop the car, and a narrow escape in getting off. So for a while we worked along there, and one night a wheel broke off and we had to take the thing in on three wheels, and the body was broken also."

That the second portion of said statement, as objected to by defendant (as will appear by the testimony contained on page 4 of the bill of exceptions in this cause), was as follows, to wit:

"We came in with the car in this shape and it was useless, and

Kirk applied to the roadmaster for a new car. Massey was roadmaster. Cannot tell his initials."

That the third portion of said statement, as objected to by defendant (as will appear by the testimony contained on pages 4, 5 and 6 of the bill of exceptions in this cause), was as follows, to wit: "Kirk went to the station, and this car was not fit to take us out, and he went and applied for a new car. He came back and told us that the roadmaster told him that he did not have any at the time to give him, 'but told me,' says Kirk, 'to get this car fixed up and get you fellows to work until such time as he could find one.' So Kirk put the men to work (one of them is here that he put to work) and they fixed it up with some old lumber that remained in the Cheney yard, and made a body of it, and got an old wheel and fixed it up in this shape, and took us out to work. We worked for a day or two, or some time, and were out two miles from town, and Kirk took a slab alongside the road (a slab to keep lumber on a flat car) and nailed it on the side of the car between the two wheels, ahead of the hind wheel, and nailed through this stick and drove the nail into the car; and by pulling it back you bore on the wheel and stopped the car. When he put it on he showed it to us and said, 'Now, it is not like the last brake; it is good and solid and cannot get away from us.' He said, 'This is a big improvement on the last one.' I did not know any better and believed it. We did not happen to meet any train until this morning when I got hurt. On Monday morning it was customary to run the full length of the section, and see if there was anything on the track, and then back to Cheney to work. The section was nine miles. It used to require us to go pretty fast to get back ahead of the train, and sometimes we had cattle to bury, and sometimes the track to fix. We always went as fast as we could and got
138 back as fast. The station-house that we had the car in is about one-quarter mile east of the station. Our section was from this car-house. We had to go to the station-house every day to go to work. This morning there was a train, an extra train, came into the station. We waited awhile; thought it was going to pass by. It did not, but stopped at the station. We went to the station, and when we went by Kirk told us to stop; that he wanted to go into the station and see about something. We stopped and went to doing something like shoveling cinders, while Kirk crossed over. This train was on the inside of the station from us. He crossed over the train and went as far as the station. I would not swear he went in. After awhile he came back. He said, 'Boys, get on and go to work.' We got on and went to work, and when we got about one and three-quarters miles, the third mile we were nearing a cut where the engine was supposed to whistle. This third mile commenced with that cut, and from there there was cuts and curves and much timber along the line. There were fires along there which we put out, and lots of smoke; and, besides, it was misty and foggy. When we got out here, one and three-quarters miles, Kirk says, 'Boys, this is too fast running.' They told me that this train at the station they could see another section between

here and Sprague coming behind them. That it was coming at a fast rate to make some point in Montana. It was running extra fast to make this point. I turned round and the men done the same, and tried to stop this car, which I believe was running about ten miles or so. We tried to stop it, and this man at the brake—it had been so loose he always had to hold it to keep it there, whether braking the car or not. This man put on the brake, and I was on the west end going out towards the train; the rest were on the east, or hind end. There was no one on the front end but me. This man put the brake on, and I tried at the pump handles to hold on to stop it, when he said we were going too fast. He said it must be pretty close on us now, and I tried for awhile to stop it, and in or about the time that he told us the fast train was coming he looked and said, 'Boys, here she is. It is right on us. Get on that brake and get the car off before she comes on us.' So we used the brake and handles, but we saw it was coming to no stop, nor not likely to, and I looked to see behind me if this train was near, and at the time I looked it was about one hundred feet, and I believe nearer than that. I saw there was no sign of the car coming to a stop. There were shovels and picks and sledges, and tools of different kinds, and a large jack. All these were piled on the side. They made a practice of putting them on the end of the car there was least on, and I being alone, they were put on my side, so I was standing in the center of this place to jump. I saw the train inside of one
139 hundred feet, and no sign of its stopping, and no whistle being made, though she had crossed the crossing. I made an effort to jump to the side of the car, but as the wheel comes over the car it was not easy to jump across. I tried to jump over the end, and I did get as far as the rail on the side, and I jumped to the south; the south side of the car hit me on the side of this leg, and it knocked me right into the track, ahead of the car. The car was following closely, and I knew that I could not help being catched; as it hit me and knocked me ahead I tried to raise my feet and stop it; but the car caught my foot and it was coming so fast that it was of no avail; it doubled me over and cramped me up and put my head where my feet were—turned me over. The other leg was caught in the cog of the wheel. I brought the car to a stop, and the men jumped off. I was lying on the gravel; one of the men hollered to me and said, 'Are you hurt?' Kirk said, 'There is no time for this. Get hold of the car and get it off of the track before the train runs over him.' So they got hold of the hind end and caught it up, and run around with it, and pulled it down the road-bed after them; and so, when my head was towards the rail, by their turning the car around, the engine went by and blew sand and dirt onto my head. By the time they got around this cog wheel turned a different way and released my pants so that I fell out, and some of them hollered to this train to stop and come back, but the train ran past quite a way, and they picked me up and carried me up the track and put me on the train and left me at the station, which was Cheney; did not have many minutes to wait. They put

something under my back. It was not long before the passenger train came in and they sent me to Missoula."

That the remaining and further portion of said statement, as objected to by defendant (as will appear by the testimony on pages 6 and 7 of the bill of exceptions in this cause), was as follows, to wit:

"The Sisters of Charity have told me I could stay here. They applied to the railroad company to see if they would do anything, but they would not. 'You will be a cripple for life,' Dr. Hooton says, 'I will send you to Sprague.' I said, 'What are you going to send me to Sprague for?' He said, 'I am going to send you to Sprague and have Mr. Weymouth apply to the county commissioners to put you on the county.' I said, 'The county-seat is not in Sprague.' He said this was in Cheney. At that time, when he was talking to me, the county-seat had been moved to Spokane, and I said the county-seat is at Spokane, and I said, 'You know the fix I am in, and could not you leave me in Spokane?' He said, 'That is my orders and I must do it.' So I applied to the Sisters
140 of Charity in Missoula to see if they would take me in, because I was sick at the time and could not hold anything on my stomach. The man that took me to the train had to stop several times. The hospital at Missoula was quarantined at that time, so they could not take me in. Hooton said, 'Well, you must go. I cannot keep you any longer. You must get on this night train,' which left at 12 or 1 o'clock. I said, 'Cannot you telegraph to Mr. Weymouth and have him meet me at Spokane, as well as Sprague?' Well, he, after awhile, said he would do it, and I asked him if he would not help me on the train. He would not—said the brakeman would attend to me. He said he would telegraph ahead of me to Spokane. The expressman helped me off the cars. I remained at the station and there was no account taken of me that I could see. I got some of the men that were standing there to take me into the station. When I went into the station the agent said he had something—that there was some one to come along, but had nothing to do for me. He told me that he would send a telegram to Sprague, to Weymouth. Whether he did or not I do not know. He would not tell me the answer. He kept me there from 9 to 9.30, and I begged him, as I was sick, to get some one to take me to the hospital. And I begged him to do so, and some one took me with the aid of a policeman, and I have been there ever since. The Sisters thought the company would do something on account of what Hooton told me. They applied to Weymouth, and I think to the agent. Weymouth was general superintendent or something. He had charge of the train hands. Superintendent, I believe. He used to be paymaster. They sent word to Weymouth, and Weymouth gave them no satisfaction, nor the railroad company. Hooton told me when I was leaving, 'I guess I will be down in a few days to see about this thing. Very likely we will be down there,' but he never came, nor any other man."

Third. That question 9, on page 6 of the testimony, as contained in the bill of exceptions, propounded by counsel for plaintiff to the plaintiff while being examined as a witness, should not have been

allowed by the court, as what was sought to be shown thereby was not admissible as evidence by reason of being irrelevant, immaterial, and incompetent, and plaintiff should not have been allowed to make answer thereto over the objection of defendant. The question and answer referred to are as follows, to wit:

"Question. Had Mr. Kirk, the foreman, power to hire and discharge men? Answer. He had hired and let me out during the time I was there. He told us that he had orders from the company to do this."

141 Fourth. That question 17, on page 26 of the testimony, as contained in the bill of exceptions, propounded by counsel for plaintiff to Joe Carroll, while being examined as a witness on behalf of plaintiff, should not have been allowed by the court, as what was sought to be shown thereby was not admissible as evidence by reason of being irrelevant, immaterial and incompetent, and the witness should not have been allowed to make answer thereto over the objection of defendant. The question and answer referred to are as follows, to wit: "Question. Did Kirk or the telegraph operator or any one tell you you would meet a train on the way—or probably would? Answer. Not that I know of."

Fifth. That question 7, on page 29 of the testimony, as contained in the bill of exceptions, propounded by counsel for plaintiff to Joe Carroll, while being examined as a witness on behalf of plaintiff, should not have been allowed by the court, as what was sought to be shown thereby was not admissible as evidence by reason of being irrelevant, immaterial and incompetent, and the witness should not have been allowed to make answer thereto over the objection of defendant. The question and answer referred to are as follows, to wit:

"Q. Was that a sufficient brake? A. It was just as I tell you; it was made out of a 2 x 4, about so long, put on one side of the car."

Sixth. That question 8, on page 29 of the testimony, as contained in the bill of exceptions, propounded by counsel for plaintiff to Joe Carroll, while being examined as a witness on behalf of plaintiff, should not have been allowed by the court, as what was sought to be shown thereby was not admissible as evidence by reason of being irrelevant, immaterial and incompetent, and the witness should not have been allowed to make answer thereto over the objection of defendant. The question and answer referred to are as follows, to wit: "Q. I mean by sufficient, was it a good brake; would it stop the car? A. No, sir; it was not a good brake."

Seventh. That question 10, on page 29 of the testimony, as contained in the bill of exceptions, propounded by counsel for plaintiff to Joe Carroll, while being examined as a witness on behalf of plaintiff should not have been allowed by the court, as what was sought to be shown thereby was not admissible as evidence by reason of being irrelevant, immaterial and incompetent, and the witness should not have been allowed to make answer thereto over the ob-

jection of defendant. The question and answer referred to are as follows, to wit:

142 "Q. If it had been a good brake, could the hand car have been stopped in time to get Mr. Charless off? A. If it had been a good brake I believe it could have been stopped."

Eighth. That when all the testimony on behalf of plaintiff had been taken, and the case rested, so far as plaintiff was concerned, no case had been made out against defendant, and defendant was not required to be put upon its defense, and that the evidence and testimony adduced on behalf of plaintiff was not sufficient to establish any liability on the part of or justify any recovery against the defendant. That said evidence and testimony disclosed the fact that whatever injuries were sustained or incurred by plaintiff were occasioned by or were the result of the carelessness and negligence of plaintiff himself, and the carelessness and negligent acts of his fellow-servants, engaged in the same employment, for which the defendant was not and is not responsible to the plaintiff, and there was nothing in said evidence or testimony to show or establish that any injury to plaintiff was occasioned by or occurred through the negligence of defendant, or any of its servants or employés. That the court should not have denied defendant's motion made upon the foregoing grounds, for the dismissal of said case and the nonsuit of plaintiff.

Ninth. That the court should not have required defendant to proceed to its defence of the case attempted to be made by the testimony and evidence adduced on behalf of plaintiff, but, at the close of plaintiff's testimony and after plaintiff had rested, should have directed the jury to return a verdict in favor of the defendant.

Tenth. That the court should not have denied the request of defendant, made to the court by motion at the close of the taking of the testimony and submission of the evidence, after both parties had rested, for an order directing the jury to return a verdict in favor of the defendant.

That the testimony and evidence submitted in the trial of the cause was, and is, not sufficient to establish any liability on the part of the defendant for any injury sustained by plaintiff and there was, and is, nothing in said evidence and testimony to justify the consideration by the said jury of said cause, or anything in relation hereto. It also appeared from all the testimony and evidence in the cause that whatever injury was sustained or incurred by the plaintiff was occasioned by his own negligence and careless acts, and by the carelessness and negligence of those who were and are

143 fellow-servants with him in the same employ, and for whose acts, so far as any injury to plaintiff is concerned, defendant was not, and is not liable.

That it appeared from the evidence and testimony that whatever accident or injury occurred to plaintiff was without any fault or negligence on the part of the defendant, or any acts of its servants, agents, or employés, for which it is responsible or liable to the plaintiff.

Eleventh. The court should not have submitted to the jury the

question whether the injury to the plaintiff resulted from the negligence of the defendant in needlessly exposing him to the danger of being hurt by a collision between the hand car and the extra freight train at the place where it occurred, and it was done by the giving of the following instruction to the jury:

"I think that the case, when stripped of all the side issues and the incidental questions surrounding it, resolves itself into just this question for this jury to determine: Whether the injury to the plaintiff resulted directly from the negligence of the defendant in needlessly exposing him to the danger of being hurt by a collision between the hand car and the extra freight train at the place where it occurred; or, whether the injury was a mere accident, which was the result of one of the ordinary hazards of the employment in which he was engaged."

The submission to the jury of this question was not justified by anything in the evidence.

Twelfth. The court should not have submitted to the jury the question whether the negligence (if any involved) was the negligence of the foreman in running the hand car too fast up to the point which he knew to be dangerous and of which he did not warn the other men working on the hand car, so that it was impossible for them without extra hazards to their lives to avoid a collision; nor should the court have submitted to the jury the question whether the negligence (if any) was on the part of the officers in charge of the freight train in approaching a curve in a cut, which obstructed the train from view, or passing a public crossing without giving warning by sounding the whistle or engine bell, as was done by giving the following instructions, to wit:

"Whether it was an ordinary risk of his employment, or whether an extraordinary danger caused by negligence on the part of the defendant. Whether that negligence was the negligence of the foreman in running the hand car too fast up to a point which he knew to be dangerous, and which he did not warn the other men working on the hand car of, so that it was impossible for
144 them without extreme hazard to their lives, to avoid a collision; or whether the negligence was on the part of the officers in charge of the freight train, in approaching a curve in a cut, which obstructed the train from view, or passing a public crossing without giving warning by sounding the whistle or engine bell."

There are no such questions envolved in, or arising under the pleadings, and there was nothing in the evidence to justify the submission of such questions by the court to the jury.

Thirteenth. The court should not have submitted to the jury the question whether there was actual negligence on the part of the plaintiff in any of the respects referred to in the instructions hereinbefore mentioned. And the court should not have instructed the jury, that if there was actual negligence on the part of the defendant in any of these respects which placed plaintiff in a situation of extraordinary danger, something clear beyond the ordinary risk of his employment, and his injury was not in any degree owing to his own negligence at the time, that the defendant would be liable

under any such circumstances, even though the plaintiff when in a situation of imminent and apparent danger, may have made a mistake on his part in attempting to escape from the danger, as by attempting to jump in the wrong direction, as was done by the court in the giving the following instructions to the jury, to wit:

"If in any of these respects there was actual negligence on the part of the defendant which placed plaintiff in a situation of extraordinary danger, something clear beyond the ordinary risk of his employment, and his injury was not in any degree owing to his own negligence at the time, the defendant would be liable, even though the plaintiff when in a situation of imminent and apparent danger may have made a mistake on his part in attempting to escape from the danger, as by attempting to jump in the wrong direction."

That the court should not have further continued the submission of said questions to the jury, as was done by the following instructions to the jury:

"Even a mistake of that kind, happening at a moment of extreme peril, would not be regarded as a reckless or negligent act on the part of the plaintiff which would preclude him from recovering damages."

Fourteenth. That the court should not have submitted to the jury the question whether the foreman was guilty of imprudence in running the hand car at the rate it was going, nor the question whether the freight train was approaching a curve or crossing where it was the duty of the engineer to give warning, as was done by the court by giving the following instruction:

"But if, on the other hand, this injury to him resulted from his own act in attempting to jump from the hand car at a time when it was his duty to have remained on the hand car and assist the others in checking its speed, and in removing it from the track so as to get it out of the way, and when he had no reasonable cause to regard himself as being in extreme danger; or if defendant was entirely guiltless of any negligence; if the foreman was not guilty of imprudence in running the hand car at the rate it was going; if the freight train did not approach a curve or crossing where it was the duty of the engineer to give warning, so that there was no negligence on the part of the defendant, then your verdict should be in favor of the defendant."

That the questions so submitted to the jury are not, nor any of them, involved or put in issue by the pleadings, and there is nothing in the evidence to justify their submission by the court to the jury.

Fifteenth. The court should not have submitted to the jury the question of the sufficiency of the brake on the hand car, nor the question of the knowledge of the plaintiff with regard to the same, as was done by the giving of the following instruction to the jury: "If the jury find from the evidence that the hand car in question was a necessary implement in the carrying on of the company's work, and that the said hand car was not sufficiently provided with a sufficient brake to stop it within a proper and reasonable time

when in danger of collision with other trains on said road, of which defect the plaintiff had no knowledge and could not reasonably be required or expected to have such knowledge, and that by reason of such defective brake plaintiff was injured, without contributing by his own negligence to such injury, then the company is liable to plaintiff in damages for such injury." None of these questions were involved or put in issue by the pleadings, and there is nothing in the evidence to justify their submission to the jury.

Sixteenth. That the following instruction, to wit, "If the jury find from the evidence that plaintiff was injured by or on account of the defendant's negligence, to which plaintiff did not contribute by his own negligence, then the fact that the negligence of plaintiff's fellow-servants contributed to such injury is no defense to an action by plaintiff for damages on account of such injury," was not and is not a correct statement of the law as applicable to the facts involved in said cause. The court should have instructed
146 the jury that the plaintiff was a fellow-servant with the section foreman and the other section laborers upon said hand car, and that if his injuries were occasioned by reason of any negligence or careless act of either the said section foreman or any of said section hands, or if any negligent or careless act of said section foreman or any of said section hands contributed to the injuries received by plaintiff, then the plaintiff was not entitled to recover.

Seventeenth. The court should have given the following instruction to the jury as requested by the defendant, to wit: "The jury is instructed that upon all the admissions and pleadings, and all the undisputed facts in this case, the plaintiff is not entitled to recover, and the verdict of the jury should be for the defendant."

Eighteenth. The court should not have denied defendant's motion for a new trial, and should not have rendered any judgment in favor of said plaintiff.

And the said Northern Pacific Railroad Company prays that the judgment of the United States circuit court of the ninth judicial district, for the district of Washington, heretofore rendered in the above-entitled cause, on the 11th day of May, 1891, together with the order of said court, made in said cause on the 22d day of September, 1891, denying defendant's motion for a new trial, by virtue of which said judgment was made then and there effective, may be reversed, annulled and altogether held for naught, and that it may be restored to all things which it has lost by reason of the said judgment.

MITCHELL, ASHTON & CHAPMAN,
Attorneys for Plaintiff in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the circuit court of the United States of the ninth judicial circuit for the district of Washington, eastern division, terms at Spokane, in the State of Washington, Greeting:

Because in the record and proceeding and also in the rendition of the judgment of a plea which is in the said circuit court, before

you, between Hugh Charless, plaintiff, and The Northern Pacific Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Northern Pacific Railroad Company, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your
147 seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the second Monday of December next, being the 14th day of said month, in the said circuit court of appeals, to be there and then held; that the record and proceedings aforesaid be inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this nineteenth day of November, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and sixteenth.

[SEAL.]

A. REEVES AYRES, *Clerk*,
By R. M. HOPKINS, *Deputy Clerk*.

The above writ of error is hereby allowed.

C. H. HANFORD,
U. S. District Judge for District of Washington, Presiding in the Circuit Court for said District.

In the United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error. } No. —.

Bond on Appeal.

Know all men by these presents that we, The Northern Pacific Railroad Company, plaintiff in error above named, by Charles H. Prescott, its second vice-president and attorney-in-fact, as principal, and C. W. Griggs, and Isaac W. Anderson of Tacoma, Washington, as sureties, are held and firmly bound unto Hugh Charless, of Spokane, State of Washington, in the sum of twenty-five thousand (25,000) dollars, to be paid to the said Hugh Charless, his executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and the successors and assigns of said Northern Pacific Railroad Company, and the heirs, executors, and administrators of the said C. W. Griggs and Isaac W. Anderson, and those of each of them, firmly by these presents.

Sealed with our seals and dated this nineteenth day of November, A. D. 1891.

Whereas the above-named Northern Pacific Railroad Com-
148 pany hath prosecuted a writ of error to the United States circuit court of appeals for the ninth circuit to reverse the judgment rendered in the above-entitled action by the United States circuit court of the ninth judicial circuit for the district of Washington, in the eastern division, holding terms at Spokane, in said State of Washington.

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railroad Company shall prosecute its said writ of error to effect and shall answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILROAD COMPANY,
By C. H. PRESCOTT, [SEAL.]
Its Second Vice-President and Attorney-in-fact.
C. W. GRIGGS. [SEAL.]
ISAAC W. ANDERSON. [SEAL.]

Sealed and delivered in the presence of—
A. REEVES AYRES.
J. H. MITCHELL, JR.

STATE OF WASHINGTON, } ss:
County of Pierce, }

C. W. Griggs and Isaac W. Anderson, the sureties on the above and foregoing obligation, being first duly and severally sworn, each for himself, upon oath, doth depose and say: That he is a resident and freeholder of the county of Pierce and State of Washington; that he is not a marshal, clerk, attorney, or other officer of said court, and that he is worth the sum of twenty-five thousand (25,000) dollars over and above all just debts and liabilities, and exclusive of property exempt from execution.

C. W. GRIGGS.
ISAAC W. ANDERSON.

Subscribed and sworn to before me this 19th day of November, 1891.

[SEAL.] A. REEVES AYRES,
Clerk U. S. Circuit Court.

STATE OF WASHINGTON, } ss:
County of Pierce, }

Be it remembered, that on this 19th day of November, A. D. 1891, there personally appeared before me, the undersigned, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, Charles H. Prescott, to me personally known to be the second vice-president of the Northern Pacific Railroad Company,

and the person named in and who executed the above and foregoing bond on behalf of said Northern Pacific Railroad Company, as its second vice-president and attorney-in-fact, and also C. W. Griggs and Isaac W. Anderson, the persons named in and who executed the above and foregoing bond, as sureties thereto, and
149 then and there the said Charles H. Prescott acknowledged to me that he signed and sealed said bond as second vice-president of said Northern Pacific Railroad Company and as its attorney-in-fact, as the free act and deed of said Northern Pacific Railroad Company and of himself as such second vice-president and attorney-in-fact in its behalf, and they, the said C. W. Griggs and Isaac W. Anderson, then and there acknowledged to me that they, and each of them, respectively, signed and sealed said bond as sureties thereto as their free act and deed, for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and the seal of said circuit court at Tacoma, Washington, on this 19th day of November, A. D. 1891.

[SEAL.] A. REEVES AYRES,
Clerk United States Circuit Court.

The within and above and foregoing bond, and the surety thereof, approved by me this 19th day of November, 1891.

C. H. HANFORD, *Judge.*

In the Circuit Court of the United States of the Ninth Judicial Circuit for the District of Washington, Eastern Division, Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Certificate.

I, A. Reeves Ayres, clerk of the United States circuit court of the ninth circuit for the district of Washington, do hereby certify that at the time of filing the petition for writ of error, assignment of errors, original writ of error, and bond, in the above-entitled cause in this court, there was also lodged in the office of the clerk of said above-entitled court a copy of the writ of error sued out in the above-entitled cause.

In witness whereof, I have hereunto set my hand and seal of said circuit court, this 9th day of December, A. D. 1891.

A. REEVES AYRES, *Clerk,*
[SEAL.] By L. A. WELLS, *Deputy Clerk.*

UNITED STATES OF AMERICA, *ss:*

To Hugh Charless, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit,

150 to be held at the city of San Francisco, in the State of California, on the 14th day of December, A. D. 1891, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Washington, northern division, terms at Spokane, in said State of Washington, wherein The Northern Pacific Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19th day of November, A. D. 1891, and of the Independence of the United States the one hundred and sixteenth.

[SEAL.]

A. REEVES AYRES, *Clerk*,
By R. M. HOPKINS,
Deputy Clerk.

UNITED STATES MARSHAL'S OFFICE, }
District of Washington. }

I hereby certify that I received the within citation on the 21st day of November, 1891, and personally served the same on the said 21st day of November, 1891, by delivering to and leaving with Hugh Charless, the person named in the within citation, and to whom the same is addressed, personally, in the city of Spokane, in Spokane county, in said district, a true, full and correct copy thereof, and certified to be such copy.

THOMAS R. BROWN,
U. S. Marshal,
By C. A. COLE, *Deputy*.

November 21st, 1891.

In the United States Circuit Court of Appeals for the Ninth Circuit, Holding Terms at San Francisco, State of California.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, }
vs. } No. —.
HUGH CHARLESS, Defendant in Error. }

Application for Extension of Time.

Comes now the plaintiff in error in the above-entitled cause by its counsel, and makes application for an order for an enlargement of the time within which return may be made of the writ of error sued out in the above-entitled cause, and that such enlargement may be for a period of sixteen (16) days from and after the 14th day of December, 1891, the return day mentioned in the citation issued upon the writ of error sued out herein. This application is based
151 upon the affidavit of J. H. Mitchell, Jr., one of the counsel for plaintiff in error, in the above-entitled cause.

MITCHELL, ASHTON & CHAPMAN,
Counsel for Plaintiff in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit, Holding Terms at San Francisco, State of California.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error. } No. —.

Affidavit.

J. H. Mitchell, Jr., being first duly sworn, upon oath deposes and says: That he is one of counsel for the plaintiff in error in the above-entitled cause, that the citation issued upon the writ of error sued out in the above-entitled cause was issued on the 19th day of November, 1891, and was served on the 21st day of November, 1891; that said citation fixed the return day of said writ of error on the 14th day of December, 1891, less than thirty days from the day of the signing of said citation, in accordance with the provisions of subdivision 5 of rule 14 of the above-entitled court, the said period of time between the signing of said citation and said return day being only 23 days; that said period is not sufficient time in which to allow the clerk of the court, to which the writ of error is directed, to make proper return of said writ of error, and that it will be necessary for an additional period of sixteen days from said 14th day of December, 1891, to be allowed as a proper time within which said clerk may make proper return of said writ of error; that the record of said cause is quite voluminous and requires more time for the copying thereof than in ordinary cases.

J. H. MITCHELL, JR.

Subscribed and sworn to before me, this 5th day of December, 1891.

E. R. YORK,
Notary Public in and for the State of Washington, Residing at Tacoma, in said State.

152 In the United States Circuit Court of Appeals for the Ninth Circuit, Holding Terms at San Francisco, State of California.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error. } No. —.

Order.

Now, on this 5th day of December, 1891, upon the application of counsel for plaintiff in error, for good cause shown, by affidavit of said counsel, it is ordered: That the time for the return to be made of the writ of error sued out in the above-entitled cause shall be and hereby is enlarged for the period of sixteen days beyond De

cember 14, 1891, the return day mentioned in the citation issued upon the writ of error sued out in this cause, so that the return day of said writ shall be the 30th day of December, 1891.

C. H. HANFORD,
Judge Presiding for the District of Washington, in the Ninth Judicial Circuit.

In the United States Circuit Court of the Ninth Circuit for the District of Washington for the Eastern Division, Terms at Spokane.

HUGH CHARLESS, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Præcipe.

To the clerk of the United States circuit court of the ninth judicial circuit for the district of Washington, eastern division, terms at Spokane:

In pursuance of the writ of error heretofore sued out in the above-entitled cause, you will please make a return thereof by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under your hand and the seal of the court of which you are clerk. You will include in said record copies of the following: The complaint; the demurrer interposed to the first cause of action in said complaint; the motion to strike the second cause of action in said complaint; the order overruling said demurrer and sustaining said motion to strike; the amended answer; the reply; the instructions given by the court of its own motion; the instructions requested by the plaintiff and given by the court; the instructions requested by the defendant and given by the court; the instructions requested by defendant and refused
153 by the court; verdict by the jury; judgment upon the verdict; order of the court made May 20, 1891, fixing time within which bill of exceptions should be settled; application of June 10, 1891, for extension of time for settlement of bill of exceptions with return or acceptance of service thereon; affidavits of J. H. Mitchell, Jr., and D. T. Phelps, accompanying same; notice to opposing counsel of time of presentation of application with return of acceptance of service endorsed thereon; order of court made June 17, 1891, extending time for settlement of bill of exceptions; application of June 29, 1891, for further extension of time for settlement of bill of exceptions with return of acceptance endorsed thereon; affidavit of J. H. Mitchell, Jr., in support of said application; notice to opposing counsel on presentation of said application; order of court made July 3, 1891, further extending the time within which to settle bill of exceptions; stipulation of counsel for respective parties dated July 14, 1891, relative to time for settlement of bill of exceptions; bill of exceptions as settled by the court; petition for a new trial and the order allowing the filing thereof made and endorsed thereon June 13, 1891, together with the

order endorsed thereon under said date staying all proceedings upon the verdict and the judgment entered thereon until said petition for a new trial should be heard and determined upon; affidavits of August Bowman, F. W. Gilbert, W. Moir, W. F. Carson, and J. H. Mitchell, Jr., in support of said petition for a new trial; order of court denying petition for a new trial, and order fixing the amount of bond upon appeal and fixing time within which same should be filed and for the stay of proceedings pending the giving of said bond within the time limited by order of court; petition for writ of error; assignment of errors; original writ of error; bond given upon suing out of the writ of error with the approval of the court endorsed thereon; certificate of the clerk relative to the lodgment of a copy of the writ of error in his office; the citation with the return of service endorsed thereon and this præcipe.

MITCHELL, ASHTON & CHAPMAN,
Attorneys for Defendant.

In the United States Circuit Court of the Ninth Judicial Circuit, District of Washington, for the Eastern Division, Terms at Spokane.

UNITED STATES OF AMERICA, }
District of Washington, } *ss:*

I, A. Reeves Ayres, clerk of the United States circuit court of the ninth judicial circuit, for the district of Washington, do hereby certify that the foregoing, from pages 1 to 210 inclusive, is a
154 true copy of the record of the above-entitled circuit court in the case of Hugh Charless, plaintiff, *vs.* Northern Pacific Railroad Company, defendant, No. 9, in which a writ of error to the above-entitled circuit court has been sued out on behalf of the above-named defendant from the United States circuit court of appeals for the ninth circuit, and that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office.

In witness whereof I have hereunto set my hand and the seal of said circuit court this 24th day of December, A. D. 1891.

A. REEVES AYRES, *Clerk,*
By S. A. WELLS, *Deputy Clerk.*

155 In the United States Circuit Court of Appeals for the Ninth Circuit, Holding Terms at San Francisco, State of California.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error. } No. 20. Order.

Now, on this 5th day of December, 1891, upon the application of counsel for plaintiff in error, for good cause shown by affidavit of said counsel, it is—

Ordered that the time for the return to be made of the writ of error sued out in the above-entitled cause shall be, and hereby is, enlarged for the period of sixteen days beyond December 14th, 1891, the return day mentioned in the citation issued upon the writ of error sued out in this cause, so that the return day of said writ shall be the 30th day of December, 1891.

C. H. HANFORD,
Judge Presiding for the District of Washington, in the Ninth Judicial Circuit.

Endorsed: Filed Dec'r 12, 1891. F. D. Monckton, clerk.

156 In the United States Circuit Court of Appeals for the Ninth Judicial Circuit, Terms at San Francisco, January Term, 1892.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error. } No. 20.

To Frank D. Monckton, Esq., clerk of the above-entitled court.

DEAR SIR: You will please note my appearance as attorney and counsel for the plaintiff in error in the above-entitled cause in the court above named and file the record in the above-entitled cause heretofore forwarded to you by the clerk of the United States circuit court of the ninth judicial circuit for the district of Washington, and docket the said cause.

Yours respectfully, JOHN H. MITCHELL, JR.,
Attorney and Counsel for Plaintiff in Error.

Spokane, Wash., Dec. 26, 1891.

Endorsed: Filed Dec. 31, 1891. F. D. Monckton, clerk.

157 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error. } No. 20. October Term, 189–.

The clerk will enter my appearance as counsel for the defendant in error.

A. K. McBROOM.

Endorsed: Filed Dec. 31, 1891. F. D. Monckton, clerk.

158 At a stated term, to wit, the October term, A. D. 1891, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco,

on Tuesday, the 19th day of January, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The Honorable M. P. Deady, U. S. district judge, district of Oregon, presiding; Honorable Thomas P. Hawley, U. S. district judge, district of Nevada; Honorable William W. Morrow, U. S. district judge, northern district of California.

NORTHERN PACIFIC RAILROAD COMPANY
vs.
HUGH CHARLESS. } No. 20.

Error to U. S. circuit court, district of Washington, eastern division.

Ordered cause argued by J. H. Mitchell, Jr., counsel for plaintiff in error, and A. K. McBroom, Esq., counsel for defendant in error, and submitted to the court for consideration and decision.

159 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error.

Error to the circuit court of the United States for the district of Washington.

At law. Action by Hugh Charless against the Northern Pacific Railroad Company for damages for personal injuries.

Judgment for plaintiff in the sum of $18,250.

Affirmed.

J. H. Mitchell, Jr., counsel for plaintiff in error; A. K. McBroom, and Prather & Dauson, counsel for defendant in error.

Before Deady, Hawley, and Morrow, district judges.

160 MORROW, *District Judge:*

This action was brought by Hugh Charless, defendant in error, the plaintiff below, to recover the sum of twenty-five thousand dollars for damages for personal injuries alleged to have been received by him while in the employ of The Northern Pacific Railroad Company, defendant in error, as a section hand engaged at work on the line of the road at a point near Cheney, then in the Territory, now in the State, of Washington. The case was tried before a jury, and the plaintiff had a verdict and judgment for $18,250 and costs. A motion for a new trial was made and denied, and thereupon the company sued out this writ of error. The complaint originally stated two causes of action, the first of which consisted in a statement of permanent injuries alleged to have been received by plaintiff while assisting in the course of his employment as a section

hand in operating a defective hand car upon one of the sections of the company's line of railroad.

The second cause of action set forth in the complaint consisted of allegations to the effect that at the time of the injury there were known to the medical and surgical professions certain medical, surgical, and remedial appliances by the proper use of which the plaintiff could have been almost, if not entirely, healed and cured of his injuries; that the company failed, neglected, and refused to use or have or caused to be used such appliances and medicines for the healing of plaintiff, whereby plaintiff had been rendered a cripple for the remainder of his life, unable to work or move his lower
161 limbs or the lower part of his body. The defendant demurred to the first cause of action and moved to strike out the second. The demurrer was overruled and the motion to strike out granted.

The action of the court in overruling the demurrer to the first cause of action is claimed as error on the ground that the complaint as it was allowed to stand for trial did not state facts sufficient to constitute a cause of action.

The material allegations of the complaint relating to the first cause of action are that in the operation of defendant's railroad it was necessary at all times to keep in employment and service of defendant a number of laborers for the maintenance of defendant's track and road-bed, and it became and was defendant's duty in the employment of said laborers in said service to furnish them with competent and efficient means and appliances for the proper discharge of their duties in said service and to furnish them with necessary information as to the passing of trains on defendant's road to protect themselves from injury by such trains while engaged in said service; that plaintiff was on the 28th day of August, 1886, one of the defendant's servants and employees whose duty it was to maintain a certain section of defendant's track and road-bed under the charge, control, and superintendency of one William Kirk, who was the section boss of the section running west from Cheney, and as such section boss the agent of the defendant in maintaining the track and road-bed, and had the superintendency, direction, and control of the work and the means and appliances therefor; that at said date defendant had in its employ at Cheney a telegraph operator whose duty it was to know the time of passing trains over
162 defendant's road in the vicinity of Cheney and the times of their arrival and departure therefrom, and to inform defendant's servants and employees whose safety and welfare might be endangered thereby of the times of the running of such trains; that in the carrying on of said work of maintaining said track and road-bed it became and was necessary for said servants and employees to use a certain hand car under the direction and control of the section boss; that this hand car was sufficient for its ordinary uses, but in case of immenent danger from collision it was defective in not having a sufficient brake, which, instead of brake-blocks to rub and stop the wheels, was only a short piece of timber fastened to said car at one end and made to rub upon one of the wheels by pressing

thereon with the foot; that the section boss and roadmaster knew of this defect, but told plaintiff that the brake was sufficient for the purposes of its use, and plaintiff did not know different until the happening of the accident in which he was injured; that on the said 28th day of August, 1886, while in the service and employment of the defendant as aforesaid and during working hours, plaintiff, together with other like servants and employees of defendant under the direction and superintendency of the section boss, and with the knowledge of said telegraph operator, left Cheney on said hand car going west, being ignorant of any approaching train on the road from the west and of any danger to his person on account of the running of any train in that vicinity; that when about two miles west from Cheney, near a deep cut and curve in the road sufficient to obscure an approaching train, while plaintiff was standing
163 on the front end of the hand car, working at the lever propelling the same with his back towards the direction in which they were going, the section boss standing on the rear end of the hand car, looking in the direction they were going, having full charge, control, and direction of the hand car, which was then running at the rate of about ten miles an hour, the section boss for the first time informed plaintiff that a freight train travelling east was about due at that place; that plaintiff knew that said hand car was then not far from said cut and curve in said road, immediately became apprehensive for his personal safety; that immediately upon informing plaintiff that said train was then about due at said place said section boss exclaimed, "There she comes now, put on the brake;" that thereupon one of the employés nearest the brake put it on and tried to stop the car, but failed to do so or to diminish its speed sufficiently, as it appeared to plaintiff, to prevent a collision with the approaching train, whereupon plaintiff turned to see how near the train was and what the chances of escape were; that he then saw the train but a short distance from them and approaching very rapidly without slackening its speed, and it appeared to plaintiff that a collision with the train was inevitable and that his life would be lost thereby unless he did something upon that instant to save his life; that at that time there were tools and different kinds of repair materials on the hand car so arranged along its sides that it appeared to plaintiff that it would be impossible for him to reach either side of the car to jump therefrom to the side of the track, but it did appear to him that he could jump from the front end to the side of the road and
164 avoid injury, and with this belief he did jump, with the intention of saving his life; that when he jumped from the car, instead of alighting upon his feet on the side of the road, as he expected, he fell on the road between the rails, and before he could recover himself the hand car was about to run over him, whereupon he put up his feet against the approaching hand car to stop it and prevent it running over him, but the car was coming towards him with such velocity that he could not stop it, and it ran over and upon him in such a way as to break and dislocate one of the vertebræ near the middle of his spinal column, and to cause him

other great and perman-t injuries about his back, chest, and legs; that during all the time the engineer and conductor of the freight train knew of the danger in which plaintiff was then placed and of a collision with the hand car and of the probability thereby of injuring and killing plaintiff, yet the engineer and conductor of the freight train negligently and recklessly failed and refused to slacken the speed of the train, and continued to run it at a great speed, to wit, of twenty-five miles an hour, thereby causing plaintiff great fear of immediate death by said train running over him and causing him to make the efforts he did to save his life; that the telegraph operator at Cheney knew that plaintiff left Cheney on said hand car and that a freight train was about due at that place going east, and that the hand car *h*oing west on said section at that time would be in great danger of a collision with the freight train, and the plaintiff would be in great danger of personal injury and loss of life thereby; that the telegraph operator neglegently and
165 recklessly failed, neglected, and refused to inform plaintiff thereof, whereby he was placed in the position of great imminent peril and danger, which, without his fault, resulted in the injury to him as stated; that defendant neglegently and knowingly permitted and caused plaintiff to use in its service said car having a defective brake, whereby plaintiff was made and caused to rely on the sufficiency of said brake until he had to jump from the car, causing the injuries stated.

It is urged against the sufficiency of this complaint that it contains no allegation charging negligence upon the company or upon any one for whose acts the company was responsible.

The statement of the case made by the complaint is subject to some criticism. It is not, in the most approved legal form, a plain and concise statement of facts constituting the cause of action, but we are of the opinion that, taking all the allegations of the complaint together, they, in effect, charge, 1st, that the defendant was negligent in not providing plaintiff and his co-employés with a suitably equipped hand car for the work in which they were engaged at the time of the accident; 2nd, that under the direction of the section boss the hand car was being run at the rate of about ten miles an hour when the approaching freight train was discovered immediately in front; 3rd, that the telegraph operator at Cheney negligently failed to notify plaintiff and his co-employés that in going west on the section at that time they would meet a freight train going east; 4th, that the conductor and engineer of the freight train were negligent in running their train at great speed and in not slackening the speed of the train when the danger of
166 collision with the hand car became imminent by its approach, and that the failure of the defendant through its agents to use ordinary care in these particulars was the proximate cause of the injury to the plaintiff. The question is as to whether any one or all of these allegations state a cause of action against the defendant, and its determination involves a consideration of the general rule exempting the common master from liability to one servant for injuries caused by the negligence of a fellow-servant in

the same employment. To this rule there are several important exceptions.

In Hough *v.* Railway Co., 100 U. S., 213–217, the Supreme Court of the United States affirmed an exception applicable here. The court said: "One, and perhaps the most important, of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant when conducting the master's business to perils or hazards against which he may be guarded by proper diligence upon the part of the master; to that end the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for use by the latter."

In Chicago & Milwaukee Railroad *v.* Ross, 112 U. S., 377–383, the same court held that "it is indispensible to the employer's exemption from liability to his servant for the consequence of risks thus incurred that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise
167 stipulated, and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, whilst claiming such exemption he must not himself be guilty of contributory negligence."

In Northern Pacific R. R. Co. *v.* Herbert, 116 U. S., 642–647, this doctrine was applied to a state of facts which serve to illustrate the practical application of the rule where contributory negligence is made part of the defense. In that case a brakeman was injured while acting under the orders of the yardmaster in attempting to stop cars by means of a brake that was out of order. To recover damages for the injury sustained he brought an action against the company, alleging that it was its duty to provide good and safe cars and machinery and apparatus of a like character for braking and handling them, and also to make rules and regulations for switching and handling them in the yard and for notifying employés of the condition of defective and broken cars so that they might not be subject to unnecessary danger, but he alleged that the company had neglected its duty in these particulars, and thereby, without his fault, he was injured as stated. In its answer the company admitted the allegations as to the employment of the plaintiff and the injuries he had received, but set up that it was his duty to know and that he did know the condition of each of the cars, and that he carelessly put his leg between them when setting the brake, and thus through his own fault suffered the injury of which he complained. There was a verdict for the plaintiff for $25,000, which the court, on a motion for new trial, reduced to $10,000. The Supreme
168 Court in determining the question of law involved in the writ of error said: "The general doctrine as to the exemption of an employer from liability for injuries to a servant caused by the negligence of a fellow-servant in a common employment is well settled. When several persons are thus employed there is necessarily incident to the service of each the risk that the others may fail in

that care and vigilance which are essential to his safety. In undertaking the service he assumes that risk, and if he should suffer he cannot recover from his employer. He is supposed to have taken it into consideration when he arranged for his compensation." * * *

"It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means by which it is to be performed, and to keep them in repair and order.

This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skilful colaborers or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. This doctrine has been so frequently asserted by courts of the highest character that it can hardly be considered as any longer open to serious question."

169 In Ford *v.* Fitchburg Railroad Co., 110 Mass., 240, the plaintiff was injured by the explosion of an engine upon which he was employed as engineer. The explosion was caused by a defect in the engine due to the failure of the company to keep the engine in proper repair. It was contended on the part of the defense that negligence in keeping the engine in repair was the negligence of a fellow-servant. The supreme court of Massachusetts held that the company was liable. The court said: "The rule of law which exempts the master from responsibility to the servant from injuries received from the ordinary risks of his employment, including the negligence of his fellow-servant, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule, relied on to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant."

In Flike *v.* The Boston and Albany Railroad Company, 53 N. Y., 549, an agent of the company whose duty it was to make up and dispatch trains and to employ and station brakemen thereon
170 sent out a train with two brakemen when three was the usual number required. The agent did in fact employ a third brakeman, who by reason of oversleeping failed to get on board in time. The train parted, and in consequence of the want of necessary brakemen one part of the train ran back and collided with

another train a short distance in the rear, killing a fireman on the latter train who was also a servant of the company. The action was to recover damages for the death of the fireman.

It was claimed that the injury was attributable to the negligence of the brakeman who failed to report for duty, or, if caused by the negligence of the agent in not supplying the place of the defaulting brakeman with another man, such negligence in either case should be regarded as the negligence of a fellow-servant, for which the company was not responsible. The court held that neither of these positions was tenable. In discussing the law applicable to the case, Church, chief judge, speaking for the court, said: "The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present and consequently liable for the manner in which they are performed."

In Cone *v.* Delaware, etc., Railroad Co., 81 N. Y., 206, the plaintiff was a car-repairer in defendant's employ and was injured by steam escaping from a locomotive engine. The engine was,
171 in many particulars, in bad condition; its fire-box was burned out, stay-bolts had given way; its cylinders needed boring out, its valves facing; it leaked badly, and its flues were defective; its throttle valve leaked, and the thread upon the screw, which served to hold the reverse bar in place and thus control the motion of the engine, was so worn out as to be useless. In consequence of these defects the steam escaped from the boiler into the cylinders, the engine was put in motion, and the accident occurred of which the plaintiff complained. It was claimed on the part of the defendant that the engine was furnished with cylinder cocks; that these cocks if opened would have allowed the steam to escape, thus preventing its accumulation in the cylinder and its pressure upon the piston; that the engineer omitted to open the cocks and was therefore guilty of negligence, and that it was this negligence which caused the injury, and so the defendant was exonerated. The court in commenting upon this defense said: "But the cylinder cocks were part of a perfect machine; they were not added to supply the defects or any of them to which I have above called attention; therefore the defendant's contention comes to this: We concede that we failed in our duty; we did not supply a suitable machine, but our servant, the engineer, could, notwithstanding, have so managed that the defect should cause no harm.

If this doctrine is accepted it will loosen the rule of responsibility which now bears none too closely upon corporate conduct. It will seldom happen that unusual care on the part of an engineer would not prevent an accident. In this case he might have opened the cocks or blocked the wheels, or with extreme care so separated the engine from its train that the two should occupy separate
172 tracks. It now seems that it would have been well to have done one or the other of these things. His omission to do so

may have been negligence toward the defendant, but it does not remove the responsibility which attached to it to furnish good and suitable machinery or place it upon a subordinate whose duty is to be measured by the degree of skill necessary for its management and who is not called upon to make good the want of corporate care and attention."

The court said further:

"Neither upon principle nor authority can it be held that negligence of the servant in using imperfect machinery excuses the principal from liability to a co-employee for an injury which could not have happened had the machinery been suitable for the use to which it was applied."

Numerous cases might be cited to the same effect, but it will not be necessary to multiply authorities on the point, since the law is well established by the Supreme Court of the United States and by the highest courts in many States that the absence of superior rank or title in the intervening servant or agent will not exempt the master from liability for injuries resulting from the use of defective machinery or appliances. Tested by this rule, the allegations of the complaint in the present case concerning the use of the defective hand car at a high rate of speed under the direction of the section boss in the manner described, whereby plaintiff was injured, state a cause of action. The complaint being sufficient in this particular,

173 we might stop here, but we will notice briefly one of the remaining allegations for the purpose of referring to another feature of the question where the liability of the master, according to some decisions, may be determined by the character of the duty required to be performed by the servant.

The telegraph operator at Cheney is charged with negligence in not notifying the plaintiff and his co-employees on the hand car of the movements of the freight train, the danger of a collision with which caused the plaintiff to jump from the hand car, whereby he was injured. It was the duty of the company, as admitted in its amended answer, to furnish its employees engaged in maintaining its track and road-bed with information concerning the movements of trains over the sections on which they were employed. In the present case it is alleged that this duty was required to be performed by the telegraph operator at Cheney, but the designation of the official is immaterial. It was a direct, positive duty which the company owed such employees as were exposed to danger by the movement of trains. In Lewis *et al. v.* Seifert, 116 Pa. St., 628–647, it was determined that a train-dispatcher, wielding the power and authority of a railroad company in the moving of trains, in the changing of schedules, or the making of new ones, as exigencies required, is not a fellow-servant with a train employee. The court in its opinion said: "It is very plain that it was the duty of the defendant company, as between said company and its employees, to provide a reasonably good and safe road and reasonably safe and good cars, locomotives, and machinery for operating its road. It is equally clear that it was its duty to frame and promulgate

such rules and schedules for the moving of its trains as
174 would afford reasonable safety to the operators who were engaged in moving them. This is a direct, positive duty which the company owed its employés, and for the failure to perform which it would be responsible to any person injured, as a consequence thereof, whether such person be a passenger or an employee. It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably or even probably result in collisions and loss of life. This is a personal, positive duty, and while a corporation is compelled to act through agents, yet agents in performing duties of this character stand in the place of and represent the principals. In other words, they are vice-principals." We are aware that there are decisions holding that a telegraph operator does not occupy the position of a train-dispatcher merely because he transmits or delivers the orders for the movement of the trains, and that his negligence cannot be said to be the negligence of the company, but it is not necessary in this connection to determine the actual duty or responsibilities of a telegraph operator. All this is covered in the present case by the allegations of the complaint, and upon the questions involved in the demurrer these allegations must be accepted as true. The point is that the duty of keeping the employees on the section informed as to the movement of trains over that section was a positive duty devolving upon the company, and where injuries are sustained by reason of negligence in the performance of that duty the company is liable.

The complaint being sufficient in the particulars mentioned disposes of the first exception.

175 It is next claimed as error that the plaintiff was allowed on the trial to make a statement in narrative form as a witness in his own behalf without being specially interrogated by his counsel in reference to the particular matters involved in the case; that the statement was made in such a way as to afford the defendant no opportunity of making any objection to any particular portion and was allowed to be made over the general objection that it contained matters immaterial to the issues and incompetent as being hearsay and not the best evidence.

It appears from the record that after a few preliminary questions the plaintiff was asked the following question by his counsel:

"Turn to the jury and tell them the facts in this case, commencing at the time of your employment with the Northern Pacific Railroad Company, and tell them the complete story."

To this question no objection was made. The plaintiff therefore proceeded to relate the facts in the case as requested. After stating the particulars of his employment, the use of the hand car, the method of stopping it, and the breaking of one of its wheels, counsel for defendant objected to the course in which the taking of the testimony was proceeding, claiming that the witness was making a statement of matters immaterial to the issues involved in the case and incompetent as being hearsay and not the best evidence, and that he desired to interpose such objections, but that owing to the

fact that the testimony was being given in a nar-ative form no opportunity was given counsel to properly interpose such objection. The court replied to this objection that the taking of the witness' testimony in the nar-ative form would be the best way of get-
176 ting at what he knew or could state concerning the matter at issue; that it would save time to proceed in that way and would perhaps furnish to the jury a more connected statement of the matter to be told as it occurred and took place.

It was within the discretion of the court to allow the witness to give his testimony in a narrative form. Thompson on Trials, sec. 354. In general, this practice is commended by text-writers. Mr. Chitty, in speaking of this method of examining witnesses, says: "It is certainly the practice when the time and place of the scene of action have once been fixed to desire the witness to give his own account of the matter, directing him, when not a professional person, to omit as he proceeds account of what he has only heard from others and not seen or heard himself, and which he is apt to suppose is quite as material as that which he himself has seen."

The author says further: "It is difficult, therefore, to extract the important parts of his evidence piecemeal, but if his attention be first drawn to the transaction by asking him when and where it happened and he be told to describe it from the beginning he will generally proceed in his own way to detail all the facts in the due order of time." 3 Chitty's Gen'l Practice, 894. But if, in the giving of such testimony, the witness states matters irrelevant or immaterial or incompetent as being hearsay, it is the right and duty of counsel objecting to such testimony to interpose and arrest the narrative by calling the attention of the court particularly to the objectionable matter, and, by a motion to strike it out, obtain a ruling of the court excluding such testimony from the case. Gould *v.* Day, 94 U. S., 405–414.

177 "It is the duty of a party taking exceptions to the admissibility of evidence to point the part out excepted to when the evidence consists of a number of particulars, so that the attention of the court may be drawn to the particular objection." Moore *v.* Bank of Metropolis, 13 Pet., 302-310; United States *v.* McMasters, 4 Wall., 680–682.

"It is the duty of the party to select the incompetent from the competent testimony, and to point out in his motion the specific testimony objected to, as well as to indicate the character of the objection." Thompson on Trials, sec. 719. It does not appear that counsel for defendant was deprived of an opportunity to make such a motion, and the proceedings cannot be considered as error.

Errors are assigned that the court allowed the plaintiff and another witness to answer certain questions over the objection of counsel for defendant. These questions related to and made inquiry concerning the power of the foreman, Kirk, to hire and discharge men; whether Kirk or the telegraph operator or any one told witness that they would meet a train, and as to the sufficiency of the brake on the hand car. The objection to each question as stated in the assignment of errors is that "What was sought to be

shown thereby was not admissible as evidence by reason of being irrelevant, immaterial, and incompetent." This objection was not, however, incorporated into the bill of exceptions. All that appears there is the formal record, "Objection taken, overruled, exception allowed." The evidence called for appears to have been relevant,
material, and competent, but the objection as stated in the
178 bill of exceptions is too general to present any question for review. "Where evidence is objected to at the trial, if the party would save an exception to the ruling of the court if adverse to him, such as will be available on appeal or error, he must frame his objection so as to bring to the attention of the trial court the specific ground upon which he predicates it, and this must be stated in the bill of exceptions." Thompson on Trials, sec. 693, and cases there cited.

When the plaintiff had closed his testimony and rested his case counsel for defendant moved the court for an order dismissing the case and for the nonsuit of the plaintiff. The motion was denied, and the action of the court in denying the motion is claimed as error. The refusal of the court to grant this motion was in accordance with the established practice. It has been repeatedly decided by the Supreme Court that courts of the United States have no power to order a peremptory nonsuit against the will of the plaintiff. Elmore *v.* Grymes, 1 Pet., 469; D'Wolf *v.* Raband, 1 Pet., 476–496; Crane *v.* The Lessee of Morris and Astor, 6 Pet., 598–610; Selsby *et al. v.* Foot, 14 How., 218–222; Castle *v.* Bullard, 23 How., 172–183. It is also assigned as error that the court should not have required defendant to proceed to its defence after plaintiff had rested his case, but should have directed the jury to return a verdict in favor of the defendant. That motion, however, does not appear by the bill of exceptions to have been made by counsel for defendant; besides, he proceeded with the defense and introduced
testimony in that behalf. This action on his part effectually
179 disposed of all question of error. The refusal of the court to instruct the jury at the close of plaintiff's evidence that he was not entitled to recover could not be assigned as error, even if the proper motion had been made, because the defendant at the time of requesting such instruction had not rested his case, but afterwards went on and introduced evidence in its own behalf. Grand Trunk Railway Co. *v.* Cummings, 106 U. S., 700, 701; Accident Ins. Co., *v.* Crandall, 120 U. S., 527–530; Robinson *v.* Perkins, 129 U. S., 233–236.

The testimony of both parties having been concluded, defendant's counsel, by motion, requested the court to direct the jury to return a verdict in favor of the defendant upon the grounds that the evidence submitted on the trial of the case was not sufficient to establish the liability of the defendant for any injuries sustained by the plaintiff; that it appeared from the evidence that whatever injuries were sustained by the plaintiff were occasioned by his own negligent and careless acts and by the negligence and carelessness of those who were fellow-servants with him in the same employment, and that it appeared from the evidence that whatever injuries

occurred to plaintiff were without the fault or negligence of the defendant or of any of its servants or agent or employees for which it was responsible or liable to the plaintiff. The court refused to direct the jury as requested, and the denial of the motion is assigned as error.

It is well settled that the court may withdraw a case from the consideration of the jury and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the
180 evidence is undisputed or is of such conclusive character that the court in the exercise of a sound judicial discretion would be compelled to set aside a verdict in opposition to it. Delaware, &c., Railroad *v.* Converse, 139 U. S., 469–472. Does the present case come within this rule? The evidence introduced on the part of the plaintiff tended to prove the following facts: Plaintiff was employed by the defendant in section-work under a foreman. When he went to work the hand car in use on the section had no brake attachment, but was stopped by means of a stick inserted between the spokes of one of the wheels. This stick was used for this purpose until Kirk became foreman of the section, when one day in attempting to stop the car to get out of the way of a train following rapidly behind it the workman performing the duty of stopping the car by this device struck a spoke in the wheel and the stick was knocked out of his hands. They had difficulty on this occasion in stopping the car and a narrow escape in getting it off the track, but they worked along in this way until a wheel broke off, when Kirk, the foreman, applied to the roadmaster for a new car. He failed to get it. The disabled car was thereupon repaired by an old wheel in place of the broken one, and the foreman nailed a stick on the side of the car for a brake. The upper end of this stick being pulled back, its lower end pressed upon one of the wheels acting as a brake. When the foreman placed this stick on the car he called the attention of the sectionmen to it and said, "Now, it is not like the last brake; it is good and solid and cannot get away from us. It is a big improvement on the last one." They did not, however, meet a train with this car until the morning of the accident. That
181 morning an extra freight train came into the station at Cheney. The section-house was about one-fourth of a mile east of the station. The sectionmen waited awhile for this train to pass. It did not, but stopped at the station. The foreman, Kirk, with plaintiff and the other sectionmen, went to the station. From this point the testimony tending to prove the circumstances immediately connected with the accident may be stated in the language of the plaintiff, who testified as follows: "We went to the station, and when we went by Kirk told us to stop; that he wanted to go into the station and see about something. We stopped and went to doing something like shoveling cinders while Kirk crossed over. This train was on the inside of the station from us. He crossed over the train and went as far as the station. I would not swear he went in. After awhile he came back. He said, 'Boys, get on and go to work.' We got on and went to work, and when we got about one and three-quarter miles, the third mile we were nearing a cut

and where the engine was supposed to whistle. This third mile commenced with that cut, and from there there were cuts and curves and much timber along the line. There were fires along there, which we put out, and lots of smoke, and besides it was misty and foggy. When we got out here, one and three-quarter miles, Kirk says, 'Boys, this is too fast running. They told me that this train, at the station, they could see another section between here and Sprague coming behind them; that it was coming at a fast rate to make some point in Montana. It was running extra fast to make this point.' I turned around and the men done the same and tried to stop this car, which I
182 believe was running about ten miles or so. We tried to stop it, and this man at the brake—it had been so loose he always had to hold it to keep it there, whether braking the car or not—this man put on the brake, and I was on the west end going out toward the train. The rest were on the east or hind end. There was no one on the front end but me. This man put the brake on and I tried at the pump handles to hold on to stop it, when he said we were going too fast. He said, 'It must be pretty close on us now,' and I tried for a while to stop it, and in or about the time that he told us the fast train was coming he looked and said, 'Boys, here she is; it is right onto us; get on that brake and get the car off before she comes on us.' So we used the brake and handles, but we saw it was coming to no stop, or not likely to, and I looked to see behind me if this train was near, and at the time I looked it was about one hundred feet, and, I believe, nearer than that. I saw there was no sign of the car coming to a stop. There were shovels and picks and sledges and tools of different kinds and the large jack; all these were piled on the side. They made a practice of putting them on the end of the car there was least on, and, I being alone, they were on my side, so I was standing in the center in front of this place to jump. I saw the train inside of one hundred feet and no sign of its stopping, and no whistle being made, though she had crossed the crossing. I made an effort to jump to the side of the car, but, as the wheel comes over the car, it was not easy to jump across. I tried to jump over the end, and I did not get as far as the rail on the side, as I jumped to the south. The south side of
183 the car hit me on the side of this leg, and it knocked me right into the track ahead of the car. The car was following closely and I knew that I could not help being catched. As it hit me and knocked me ahead I tried to raise my feet and stop it, but the car caught my foot, and it was coming so fast that it was of no avail. It doubled me over and cramped me up and put my head where my feet were—turned me over, The other leg was caught in the cog of the wheel. I brought the car to a stop and the men jumped off. I was lying on the gravel. One of the men hollered to me and said, 'Are you hurt?' Kirk said, 'There is no time for this; get hold of the car and get it off the track before the train runs over him.' So they got hold of the hind end and caught it up and ran around with it and pulled it down the road-bed after them, and so when my head was towards the rail by their turning the car around

the engine went by and blew sand and dirt onto my head. By the time they got around this cog wheel turned a different way and released my pants, so that I fell out, and some of them hollered to this train to stop and come back, but the train ran past quite a ways and they picked me up and carried me up the track and put me on the train and left me at the station, which was Cheney." * * *

Plaintiff further testified in substance, upon direct and cross examination, among other things, that there was a crossing near where the approaching train was at the time of the accident; that plaintiff did not hear the engine whistle; that if it had whistled he would have heard it; that the freight train was running at the rate of nearly thirty miles an hour when it passed him after the accident; that as soon as Kirk notified the men on the car that
184 a train was coming they took means to stop the car by the man at the brake bearing down on it; that the brake was a piece of slab that Kirk had picked up, about two feet six inches long; that he nailed it to the side of the car between the front and hind wheels, about five or six inches ahead of the wheel. The wide side of the stick was to the side of the car, with a nail drove through it, and the narrow side was to take up and hold by, and by holding down with the hand the brake was applied to the wheel. The side of the stick towards the car was about three inches wide, but the side that rubbed on the wheel was not two inches. The wheel was about three inches wide. The plaintiff never objected to these appliances nor to the condition of the car. He did what he was told and worked the best he could. As far as the car was concerned he did not claim to have known anything, because it was his opinion when they put on the brake it was first class; had been told since that it was not.

In addition to the testimony evidence was introduced by plaintiff tending to prove that the brake on the hand car was not a good one; that if it had been a good brake it could have stopped the hand car in time for plaintiff to have got off; that the brake operated only on one wheel, and that wheel loose; that wheels on the car were not mates; that two were alike and the other two did not belong to the same car; that the cog wheels sometimes slipped, and that the car was a patched-up car; that the cut near where the accident occurred was twenty feet high, and that the engine of the approaching train did not whistle before entering the cut, and that there was a telegraph operator at Cheney. It is admitted in the answer that it was the duty of defendant to furnish la-
185 borers engaged in maintaining the track and road-bed of defendant with necessary information as to the passing of trains on the defendant's road.

The testimony on the part of the defense tended to prove that the section on which plaintiff was employed was the easiest on the division; that the appliances for the hand car were good for the section; that the lever brake on the car at the time of the accident was as good as any in use on the road; that it rubbed on the top of the hind wheels and the lower rim of the front wheels, and by its application on the occasion in question the car had almost stopped when

Charless went off; that the cut near where the accident occurred was from six to eight feet high, and persons approaching it at one end could see across the tangent of the cut and curve to the other end. It will not be necessary to refer further to the testimony on the part of the defense; enough has been stated to show that it contradicted the testimony on the part of the plaintiff in many particulars. It was the province of the jury to weigh this conflicting evidence and determine the actual facts. It was a fair question for the jury to determine from the testimony whether the accident would have happened if the defendant had used ordinary care in providing the plaintiff and his co-employés on the section with a hand car suitably equipped with a safe and effective brake for the work in which they were engaged. New Jersey & N. Y. R. Co. *v.* Young, circuit court of appeals, 1 U. S. App., 69; 49 Fed. Rep., 723–725. It was also a fair question whether the accident would have happened had the defendant used ordinary care in the movement of its trains and in notifying the sectionmen of the approach and passage of such trains.

186 In Grand Trunk R'y Co. *v.* Ives, 144 U. S., 408–417, plaintiff's intestate was killed by a railway train at a street crossing in the city of Detroit. In the court below the question of negligence or want of ordinary care and prudence was submitted to the jury to decide. The Supreme Court held that the instruction to this effect was correct, and in defining the province of the jury in such a case said:

"There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent and what shall constitute ordinary care under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms as applied to the conduct and affairs of men have a relative significance and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever con-

187 sidered as one of law for the court. Railroad Co. *v.* Pollard, 22 Wall., 341; Delaware, &c., Railroad *v.* Converse, 139 U. S., 469; Thompson *v.* Flint, &c., Railway, 57 Michigan, 300; Lake Shore, &c., Railway *v.* Miller, 25 Michigan, 274; Railway *v.* Van Steinberg, 17 Michigan, 99, 122; Gaynor *v.* Old Colony & Newport Railway, 100 Mass., 208–212; Marietta, &c., Railroad Co. *v.* Picksley, 24 Ohio St., 654; Pennsylvania Railroad *v.* Ogier, 35 Penn. St.,

60; Robinson *v.* Cone, 22 Vermont, 213; Jamison *v.* San José, &c., Railroad, 55 California, 593; Redfield on Railways (5th ed.), sec. 133, p. 2; 16 Am. & Eng. Enc. Law, tit. 'Negligence,' 402, and authorities cited in note 2."

We think upon the testimony in this case the court below properly denied the motion to direct the jury to return a verdict for the defendant.

Exceptions were taken to the following instructions of the court, and the giving of each instruction is separately assigned as error. They will be considered together.

"I think that the case, when stripped of all the side issues and the incidental questions surrounding it, resolves itself into just this question for this jury to determine: Whether the injury to the plaintiff resulted directly from the negligence of the defendant in needlessly exposing him to the danger of being hurt by a collision between the hand car and the extra freight train at the place where it occurred, or whether the injury was a mere accident which was the result of one of the ordinary hazards of the employment in which he was engaged; whether it was an ordinary risk of his employment, or whether an extraordinary danger caused by a negligence on the part of the defendant; whether that negligence
188 was a negligence of the foreman in running the hand car too fast up to a point which he knew to be dangerous and which he did not warn the other men working on the hand car of, so that it was impossible for them without extreme hazard to their lives to avoid a collision, or whether the negligence was on the part of the officers in charge of the freight train in approaching a curve in the cut which obstructed the train from view, or passing a public crossing without giving warning by sounding the whistle or engine bell.

If in any of these respects there was actual neglect on the part of defendant which placed the plaintiff in a situation of extraordinary danger, something clear beyond the ordinary risks of his employment, and his injury was not in any degree owing to his own negligence at the time, the defendant would be liable to damages, and be liable even though the plaintiff, when in a situation of imminent and apparent danger, may have made a mistake on his part in attempting to escape from the danger, as by attempting to jump in the wrong direction. Even a mistake of that kind, happening at a moment of extreme peril, would not be regarded as reckless or negligent act on the part of plaintiff which would preclude him from recovering damages.

But if, on the other hand, this injury to him resulted from his own act in attempting to jump from the hand car at a time when it was his duty to have remained on the hand car and assist the others in checking its speed and removing it from the track so as to get it out of the way, and when he had no reasonable cause to regard himself as being in extreme danger, or if the defendant was
189 entirely guiltless of any negligence; if the foreman was not guilty of imprudence in running the hand car at the rate it was going; if the freight train did not approach a curve or cross-

ing where it was the duty of the engineer to give warning, so that there was no negligence on the part of the defendant, then your verdict should be in favor of the defendant.

If the jury find from the evidence that the hand car in question was a necessary implement in the carrying on of the company's work, and that the said hand car was not sufficiently provided with a sufficient brake to stop it within a proper and reasonable time when in danger of collision with other trains on said road, of which defect plaintiff had no knowledge and could not reasonably be required or expected to have such knowledge, and that by reason of such defective brake plaintiff was injured without contributing his own negligence to such injury, then the company is liable to plaintiff in damages for such injury.

If the jury find from the evidence that plaintiff was injured by or on account of defendant's negligence, to which plaintiff did not contribute by his own negligence, then the fact that the negligence of plaintiff's fellow-servants contributed to such injury is no defense to an action by plaintiff for damages on account of such injury."

It is objected that the questions so submitted to the jury were not put in issue by the pleadings, and that there was nothing in the evidence to justify their submission by the court to the jury.

Much that is said in support of these objections was urged in effect against the sufficiency of the allegations of the com-
190 plaint and in favor of the motion to direct the jury to find for the defendant, and need not be further considered.

It is objected, however, that the instructions contained the statement of certain situations in the alternative, the existence of any one of which rendered the company liable for the injury of the plaintiff. Two of these remain to be noticed:

(1.) Whether there was negligence on the part of the foreman in running the hand car too fast up to a point which he knew to be dangerous and of which he did not warn the other men working on the hand car, so that it was impossible for them without extreme hazard to their lives to avoid a collision.

(2.) Whether the negligence was on the part of the officers in charge of the freight train in approaching a curve in a cut which obstructed the train from view or passing a public crossing without giving warning by sounding the whistle or engine bell.

Standing alone, the first situation would seem to involve the question as to whether the foreman was a fellow-servant of the plaintiff; but the conduct of the foreman in this case in operating the hand car cannot be wholly separated from the antecedent and then existing condition of the car itself. Had the company furnished a new hand car with proper brake appliances in place of the broken and disabled car or repaired the latter with a new and effective brake, the imminent danger of collision with the freight train would not have occurred. The defendant is not liable if the negligence of a fellow-servant is the sole cause of the accident,
191 because, being a fellow-servant, his negligence is one of the risks for which the defendant, as master, did not assume to

be responsible; but negligence of a fellow-servant does not excuse the master from liability to a coservant for an injury which would not have happened had the master performed his duty. New Jersey & N. Y. R. Co. *v.* Young, *supra*. The situation indicated by the court must therefore be considered in connection with the surroundings and circumstances of the case, and particularly with respect to the testimony relating to the safety of the hand car. The jury could not have ignored this feature of the case under the instruction as given and taken in connection with other instructions. We cannot see that the defendant was prejudiced by it even if we assume that the foreman was a fellow-servant of plaintiff.

The second situation suggests the same question with respect to the conduct of the conductor and engineer of the freight train, and it also necessarily involves the question as to the condition of the hand car. The testimony tending to prove negligence on the part of the conductor and engineer of the freight train is not answered by saying that they must have supposed that the hand car was properly equipped with a safe and effective brake, and that the sectionmen would therefore be able to escape from the track with the car in time to avoid a collision. It was the duty of those in charge of the freight train to observe every rule of safety established for the movement of their train, and the employees on the hand car had the right to expect from them the usual warnings in approaching places of danger.

192 In Chicago & Milwaukee Railroad *vs.* Ross, 112 U. S., 377, the liability of a railway company for the negligence of a train conductor was fully discussed, and it was there held that he was not a fellow-servant of the engineer and other employees of the corporation on the train. The principles of law declared in that case would determine that the conductor and engineer of a freight train were not the fellow-servants of a section hand, employed as was the plaintiff in this case; but it is not necessary to pass upon that question here in view of the other circumstances attending the situation; moreover, there is evidence tending to show that the freight train referred to in the instructions was the second section of a special freight train, running "at a fast rate to make some point in Montana; it was running extra fast to make this point." Clearly the movement of such a train must have been under the direction of an officer "clothed with the control and management of a distinct department," and the negligence of the officers in charge of such a train in not giving the usual warning in approaching a curve in a cut or in passing a public crossing was not one of the usual and ordinary risks assumed by plaintiff as incident to his employment.

Furthermore, the instructions were qualified by the following instructions, given by the court on its own motion immediately preceding those to which exceptions were taken:

"To explain this matter a little more fully, it is a principle in all suits to recover damages for negligence that the plaintiff cannot recover if the injury to himself was in part owing to his own

193 negligence (or, in law, contributory negligence), even though

there was negligence on the part of defendant which caused the injury. If that injury was also in part caused by contributory negligence on the part of the plaintiff, plaintiff cannot recover damages.

It is also a principle governing suits to recover damages by employés against the employer that the employé, as a part of his contract of employment when he goes into the service, assumes on his part the risks and dangers that are ordinarily incident to the service in which he engages; he also assumes on his part that he is competent to perform the service which he undertakes to perform; that he has sufficient knowledge of the tools and implements which he is required to use in the service, to know when they are safe and suitable, and to look out for himself against injury resulting from the use of such tools as are suitable and proper; and it is his duty, if he is handling implements which he knows unsuitable, to give notice of it to his employer, and a failure on his part to perform the duty of giving notice would absolve the employer from liability for injury resulting from such defect."

The following instructions, among others, were also given, by request of counsel for defendant:

"The jury are instructed that the defendant was not a guarantor of the safety of its machinery and appliances, and was only bound to use ordinary care and prudence in the selection and arrangement and care thereof and had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe.

The defendant was not and is not bound, as an employer, to insure the absolute safety of the machinery or mechanical
194 appliances which it provided or provides for the use of its employés, nor was it bound to supply the best and safest or newest of appliances for the purpose of securing the safety of those who are employed by it.

If the plaintiff himself was wanting in such reasonable care and prudence as would have prevented the hap-ening of the accident, he is guilty of contributory negligence, and defendant is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery or appliances through the negligence of the defendant."

We are of the opinion that the instructions, taken altogether and in view of all of the circumstances of the case, were fair and reasonable and guarded the interest of the defendant at every point. As was said by Judge Brewer in Crew *v.* St. Louis, K. & N. W. R'y Co., 20 Fed. Rep., 94, "The question in all such cases is not whether some technical error may not have crept into the instructions, but whether, taking the case as a whole and looking at the instructions as a whole, it is apparent that the law was presented fairly and correctly to the jury."

It is assigned as error that the court should not have denied defendant's motion for a new trial, and should not have rendered any judgment in favor of the plaintiff. In the petition for a new trial the grounds alleged in that behalf were accident and surprise which

ordinary prudence could not have guarded against, newly discovered evidence material for defendant which it could not with reasonable diligence have discovered and produced at the trial,
195 insufficiency of the evidence to justify the verdict, and that the verdict was against the law; error in law occurring at the trial and excepted to at the time by the defendant, and excessive damages, the award made by the verdict appearing to have been given by the jury by reason of passion and prejudice.

The overruling of a motion for a new trial is not a subject of exception under the practice established in courts of the United States.

Parsons *v.* Bedford, 3 Pet., 433–445.
Minor *v.* Tillatson, 2 How., 392–394.
Barreda *v.* Selsbee, 21 How., 146–167.
Insurance Co. *v.* Folsom, 18 Wall., 237–249.
Indianapolis, etc., R. R. Co. *v.* Horst, 93 U. S., 291–301.
Railroad Co. *v.* Fraloff, 100 U. S., 24–31.
Newcomb *v.* Wood, 97 U. S., 581–583.
Missouri Pacific Railway Co. *v.* Chicago & A. Railroad Co., 132 U. S., 191.
Fishburn *v.* Chicago, Milwaukee and St. Paul Railway Company, 137 U. S., 60, 61.
Wilson *v.* Everett, 139 U. S., 616–621.
Ætna Life Insurance Co. *v.* Ward, 76–91.
Erie Railroad Co. *v.* Winter, 143 U. S., 60–75.

In the last case the Supreme Court states the province of the court as follows:

"Whether the verdict was excessive is not our province to determine on this writ of error. The correction of that error, if there were any, lay with the court below upon a motion for a new trial, the granting or refusal of which is not assignable for error
196 here. As stated by us in Ætna Life Ins. Co. *v.* Ward, 'It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence we might arrive at a different conclusion; but that is not our province on a writ of error. In such a case we are confined to the consideration of exceptions taken at the trial to the admission or rejection of evidence and to the charge of the court and its refusals to charge. We have no concern with questions of fact or the weight to be given to the evidence which was properly admitted.'"

Judgment affirmed.

Endorsed: United States circuit court of appeals for the ninth circuit. Opinion. Filed Aug. 4, 1892. F. D. Monckton, clerk.

197 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1891.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS. } No. 20.

In error to the circuit court of the United States for the district of Washington, eastern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, eastern division, and was argued by counsel.

On consideration whereof it is now ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and the cause is remanded to said circuit court for such execution and proceedings as may be necessary in accordance with the opinion of this court.

(Endorsed:) Judgment. Filed Aug. 4, 1892. F. D. Monckton, clerk.

198 At a stated term, to wit, the October term, A. D. 1891, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Wednesday, the tenth day of August, in the year of our Lord one thousand eight hundred and ninety-two.

Present: Honorable Joseph McKenna, circuit judge; Honorable William W. Morrow, district judge.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS.

On application of J. H. Mitchell, Jr., Esq., counsel for plaintiff in error—

It is ordered that the issuance of a mandate herein to the court below be, and the same is, stayed sixty days from date.

199 At a stated term, to wit, the October term, A. D. 1892, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Wednesday, the fifth day of October, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Joseph McKenna, circuit judge; Honorable Thomas P. Hawley, district judge; Honorable William W. Morrow, district judge.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS. } No. 20.

A motion in writing for an additional stay of mandate herein having been this day filed and presented to the court by Joseph D. Redding, Esquire, counsel for the plaintiff in error herein, and the said motion having been submitted and due consideration thereon had—

It is ordered that said motion be, and the same is hereby, granted and the issuance of a mandate herein to the court below is hereby stayed until the 25th day of October, 1892.

200 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error.

To the honorable judges of the United States circuit court of appeals for the ninth circuit:

Your petitioner, The Northern Pacific Railroad Company, the plaintiff in error in the above-entitled action, respectfully shows that by the judgment heretofore rendered by said United States circuit court of appeals for the ninth circuit in the above-entitled cause a manifest error hath happened, to the great damage of your petitioner in this, that a great and manifest error of law occurred at the trial of said cause against the objection of your petitioner and to its great damage, all of which will more fully appear by the record of said court in said case.

Wherefore your petitioner prays your honors to allow a writ of error from the Supreme Court of the United States to be directed to said United States circuit court of appeals for the ninth circuit, whereby, under the seal of said United States circuit court of appeals for the ninth circuit, the record and proceedings aforesaid, with all things concerning the same, may be transmitted to the Supreme Court of the United States with said writ of error, and that,
201 the record and proceedings aforesaid being duly inspected, the said Supreme Court of the United States will cause further to be done therein and correct that error what of right and according to the laws and custom of the United States should be done.

JAMES McNAUGHT,
J. H. MITCHELL, JR.,
Attorneys for Petitioner.

Above and foregoing petition granted and writ of error allowed this 14th day of October, 1892.

JOHN M. HARLAN,
Associate Justice U. S. Supreme Court.

Endorsed: No. 20. U. S. circuit court of appeals for the ninth circuit. Petition for writ of error, &c. Filed Oct. 22, 1892. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

202 United States Supreme Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error.

Of October term, in the year of our Lord one thousand eight hundred and ninety-two.

Afterwards, to wit, in the same term, before the justices of the Supreme Court of the United States, comes the said Northern Pacific Railroad Company, plaintiff in error, by James McNaught and J. H. Mitchell, Jr., its attorneys, and says that in the records and proceedings in the above-entitled action in the United States circuit court of appeals for the ninth circuit there is manifest error in this, to wit:

First. The plaintiff in error assigns as error the several errors set out in the assignment of errors forming part of the record in the above-entitled action before said circuit court of appeals. (See Rec., p. 135–146.)

Second. The said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the district of Washington, eastern division, to said circuit court of appeals, erred in making its order on the 4th day of August, 1892, affirming the judgment of the said circuit court and directing a mandate to
203 issue to the circuit court of the United States for the district of Washington, eastern division, directing that court to proceed in accordance with the decision and order of said circuit court of appeals.

Third. That said circuit court of appeals erred in not sustaining the writ of error then before it and not reversing the judgment entered in this action in said circuit court and in not directing a new trial of the issues raised by the pleadings in said action.

And said Northern Pacific Railroad Company, the plaintiff in error, prays that the judgment aforesaid entered herein in the circuit court for the district of Washington, eastern division, and the order entered herein as aforesaid by the circuit court of appeals and the judgment of affirmance to be entered in said circuit court for the district of Washington, eastern division, upon said order of affirmance, for the errors aforesaid and for other errors in the record and proceedings aforesaid, be reversed, annulled, and altogether held for naught, and that the plaintiff in error may be restored to all things which it hath lost by occasion of said judgment and order.

JAMES McNAUGHT AND
J. H. MITCHELL, JR.,
Attorneys for Plaintiff in Error.

Endorsed: No. 20. U. S circuit court of appeals for the ninth circuit. Assignment of errors. Filed Oct. 22, 1892. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

204 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error.

To the clerk of the Supreme Court of the United States:

Please issue a writ of error to the Supreme Court of the United States in the above-entitled action, and oblige,

JAMES McNAUGHT,
JOHN H. MITCHELL, JR.,
Attorneys for Petitioner.

Endorsed: No. 20. U. S. circuit court of appeals for the ninth circuit. Precipe to clerk Supreme Court for writ of error. Filed Oct. 22, 1892. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

205 In the United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error.

No. 20.
Supersedeas Bond.

Know all men by these presents that we, The Northern Pacific Railroad Company, a corporation duly organized and existing under and by virtue of an act of Congress of the United States of America entitled An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route, the plaintiff in error in the above-entitled cause, by Charles H. Prescott, its second vice-president and attorney-in-fact, and Isaac W. Anderson, of Tacoma, Washington, and Chauncey W. Griggs, of Tacoma, Washington, as sureties, are held and firmly bound unto Hugh Charless, of the city of Spokane, in the State of Washington, the defendant in error in the above-entitled action, in the sum of twenty-five thousand dollars ($25,000.00), lawful money of the United States, to be paid to the said Hugh Charles-, his executors or administrators; for the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, as well as the successors and assigns of the said Northern Pacific Railroad Company, firmly by these presents.

206 Sealed with our seals and dated this 23rd day of September, A. D. 1892.

Whereas the above-named Northern Pacific Railroad Company has prosecuted a writ of error in the Supreme Court of the United States to the United States circuit court of appeals for the ninth circuit to reverse an order made by said United States circuit court of appeals in the above-entitled action, directing that a mandate issue to the circuit court of the United States for the district of Washington, eastern division, which mandate directs said circuit court to enter judgment affirming the judgment rendered in the said cause by the judge of the circuit court of the United States for the district of Washington, eastern division:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railroad Company shall prosecute its writ of error to effect and answer all damages and costs if it shall fail to make good its pleas and its appeal, then this obligation shall be void; otherwise to be and remain in full force and virtue.

NORTHERN PACIFIC RAILROAD COMPANY,
By C. H. PRESCOTT,
Its 2nd Vice-President and Attorney-in-fact. [SEAL.]
ISAAC W. ANDERSON. [SEAL.]
CHAUNCEY W. GRIGGS. [SEAL.]

Signed, sealed, and delivered in the presence of—
W. O. CHAPMAN.
E. R. YORK.

As to signature of Chauncey W. Griggs—
CHELIAN OLDS.
W. O. CHAPMAN.

Approved Oct. 14th, 1892.

JOHN M. HARLAN,
Asso. Justice Sup. Ct. U. S.

207 STATE OF WASHINGTON, } *ss:*
County of Pierce, }

Isaac W. Anderson and Chauncy W. Griggs, being first duly sworn, each for himself and not one for *eht* other, on oath deposes and says that he is one of the sureties named in the above and foregoing bond; that he is a resident of the State of Washington, and that he is worth the sum of twenty-five thousand dollars ($25,000.00) over and above all his debts and liabilities and property exempt from execution or forced sale.

ISAAC W. ANDERSON. [SEAL.]
CHAUNCY W. GRIGGS. [SEAL.]

Subscribed and sworn to before me this 23rd day of September, 1892.

[SEAL.] W. O. CHAPMAN,
Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.

208 STATE OF WASHINGTON, } ss:
County of Pierce, }

This certifies that on this 23rd day of September, A. D. 1892, personally appeared before me, the undersigned, a notary public in and for the State of Washington, residing at Tacoma, in said State, Isaac W. Anderson and Chauncy W. Griggs, to me personally known to be the sureties mentioned in the within and foregoing bond and whose names are subscribed thereto, and they acknowledge to me that they, each of them respectively, executed the same freely and voluntarily.

In witness whereof I have hereunto set my hand and official seal the day and year in this certificate first above written.

[SEAL.] W. O. CHAPMAN,
Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.

Endorsed: No. 20. U. S. circuit court of appeals for the ninth circuit. Supersedeas bond upon writ of error to U. S. circuit court of appeals for the 9th circuit. Filed Oct. 22, 1892. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

209 I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing two hundred and eight pages, numbered from 1 to 208, inclusive, to be a full, true, and correct copy of the printed record and of all proceedings in the cause entitled Northern Pacific Railroad Company, plaintiff in error, *vs.* Hugh Charless, No. 20, in said United States circuit court of appeals, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of the United States circuit court of appeals for the ninth circuit, at San Francisco, this 25th day of October, A. D. 1892.

Seal United States Circuit Court of Appeals, Ninth Circuit.

F. D. MONCKTON, *Clerk.*

210 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Northern Pacific Railroad Company, plaintiff in error, and Hugh Charless, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record

and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 15th day of October, in the year of our Lord one thousand eight hundred and ninety-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed to operate as a supersedeas by—

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

211 [Endorsed:] D. No. 20. U.S. circuit court of appeals, ninth circuit. N. P. R. R. Co., pl'ff in error, *v.* Hugh Charless. Writ of error. Filed Oct. 22, 1892. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

The Answer of the Judges of the United of the United *States Circuit Court of Appeals for the Ninth Circuit.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said United States circuit court of appeals for the ninth circuit to the Supreme Court of the United States, within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

212 UNITED STATES OF AMERICA, *ss:*

To Hugh Charless, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Northern Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 15th day of October, in the year of our Lord one thousand eight hundred and ninety-two.

JOHN M. HARLAN,
Associate Justice Supreme Court U. S.

213 [Endorsed:] D. No. 20. U. S. circuit court of appeals, ninth circuit. N. P. R. R. Co., pl'ff in error, *v.* Hugh Charless. Citation. Filed Oct. 22, 1892. F. D. Monckton, clerk U. S. circuit court of appeals, ninth circuit.

214 In the United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY
vs.
HUGH CHARLESS.

Affidavit of Service of—

Joseph D. Redding, being duly sworn, deposes and says—

That he is one of the attorneys of record of the Northern Pacific Railroad Company in the above-entitled action, and that he resides in San Francisco, California; that on the 24th day of October, A. D. 1892, he deposited in the United States mail, with United States postage prepaid, a true copy of the original citation issued by Hon. John M. Harlan, associate justice Supreme Court United States, on the 15th day of October, 1892, and addressed to Hugh Charless; which said true copy so enclosed and posted was addressed and mailed and sent to A. K. McBroom, attorney-at-law, Great Eastern block, Spokane, Washington.

That this deponent is a regular practitioner and duly admitted to practice in all of the courts of the United States and in the supreme court of the State of California, and is over the age of 21 years.

That this affidavit is attached to the original citation and filed therewith in the papers in this case.

JOSEPH D. REDDING.

Subscribed and sworn to before me this 24th day of October, 1892.

[Seal Henry M. McGill, Notary Public, City & Co. San Francisco.]

HENRY M. McGILL,
Notary Public in and for the City and County of San Francisco.

215 [Endorsed:] D. No. 20. U. S. circuit court of appeals for the ninth circuit. Northern Pacific Railroad Co., pl'ff in error, *v.* Hugh Charless. Affidavit of service of citation. Filed Oct. 24, 1892. F. D. Monckton, clerk.

216 STATE OF WASHINGTON, } ss:
County of Spokane, }

In the United States Supreme Court.

NORTHERN PACIFIC R. R. Co., Plaintiff in Error,
vs.
HUGH CHARLESS, Defendant in Error.

Admission of Service of Copy of Citation.

Service of a copy of the citation issued from the Supreme Court of the United States in the above-entitled cause is hereby admitted this 27th day of October, A. D. 1892.

(Signed) A. K. McBROOM AND
PRATHER AND DAUSON,
Attorneys for Defendant in Error.

(Endorsed:) No. 20. U. S. circuit court of appeals, ninth circuit. Admission of service of citation. Filed Nov. 2, 1892. F. D. Monckton, clerk.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing to be a full, true, and correct copy of an original document this day filed in the above-entitled cause.

Attest my hand and the seal of said circuit court of appeals, at San Francisco, this 2nd day of November, A. D. 1892.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

217 [Endorsed:] Case No. 15,187. Supreme Court U. S., October term, 1892. Term No., 1217. The Northern Pacific R. R. Co., pl'ff in error, *vs.* Hugh Charless. Proof of service of citation. Filed Nov. 8, 1892.

Endorsed on cover: Case No. 15,187. U. S. circuit court of appeals, 9th circuit. Term No., 184. The Northern Pacific Railroad Company, plaintiff in error, *vs.* Hugh Charless. Filed November 3rd, 1892.

FILED.
MAR 13 1896
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 184.

THE NORTHERN PACIFIC RAILROAD COMPANY,

Plaintiff in Error,

vs.

HUGH CHARLESS.

Brief for Plaintiff in Error.

C. W. BUNN,
Counsel for Plaintiff in Error.

SUPREME COURT

OF THE UNITED STATES.

THE NORTHERN PACIFIC RAILROAD COMPANY,

Plaintiff in Error,

vs.

HUGH CHARLESS.

STATEMENT OF THE CASE.

Hugh Charless in this action sues the Northern Pacific Railroad Company for personal injuries. He was a section man, working in the state of Washington, one of a crew engaged in keeping the track in repair. He commenced work in May, 1886, and was injured on the 28th of August of the same year. He worked under a section foreman named Kirk. He was injured by jumping from a hand car on which he was riding to work with the foreman and section crew, to avoid what he claims to have considered an impending collision with an extra train coming from the opposite direction.

He claims or may claim negligence of the company in several respects. First in furnishing an

unfit hand car. Second, in not notifying the section men (through its telegraph operator at Cheney) of the approach of the extra train. Third, in the too fast running of the hand car by the section foreman, and in the latter not warning the men sooner of the approaching extra train. Fourth, in the engineer of the extra train not whistling to give the section men warning of his approach.

The complaint is inartificial and rambling, far from a model of pleading to say the least; but most favorably construed for plaintiff it alleges no other grounds of negligence; and the learned District Judge submitted the case to the jury on the first, third and fourth points stated only. We shall so consider the case, not arguing (as we might) that the complaint is bad as to all or any of the alleged neglects.

The plaintiff's story is: That some time before the accident the platform of the hand car and one of its wheels were broken; that the foreman not being able to get a new car, got an old wheel and put into it, repairing the platform with lumber; that when plaintiff went to work on the section the car had no brake the men using a stick and placing it between the spokes of the wheel, but when the car was repaired the foreman bolted a piece of lumber (as elsewhere appears a 2x4) onto the side of the car, so it worked as a lever, one end being pressed on the wheel to brake and stop the car; that on the morning of the accident the section crew was at Cheney, a telegraph station; that

Kirk, the foreman, went to the station and then came across the track to the men directing them to get on the car and go to their work; that when they had gone about one and three-quarters miles and were nearing a cut the section foreman told them they were running too fast, that he had been told at the station an extra train was coming at an extra fast rate of speed; that they then tried to stop the car, using the brake and pumping handles; that plaintiff looked around and saw the train coming one hundred feet or less from them at thirty miles an hour; that he had not heard it whistle though it had just passed a wagon crossing; that he tried to jump off but fell between the rails in front of the hand car and was run onto by it, injuring him severely; that the car stopped, his companions got off and lifted the car and him off the track and avoided a collision with the train. Record pages 30-33.

Beyond this very little reference to the facts is necessary. So far as the verdict could settle them they are found against the plaintiff in error, and we state them so far only as is necessary to understand the Court's charge to the jury. Kirk's authority was shown to be the usual power of a section boss or foreman; he had charge of keeping the track on his section in repair and free of obstructions; a half dozen or less men of whom Charless was one worked under him; he hired or discharged them, told them where to work and what to do and was himself a workman. The telegraph operator at Cheney was not a despatcher

and so far as appears had the usual powers and duties of local station operators.

In the bill of exceptions it is shown that the court gave the following charges to the jury which were properly excepted to. Record pages 85-88.

In defining what issues the jury should pass on and what would make the defendant liable the court said:

"Whether it was an ordinary risk of his employment or whether an extraordinary danger caused by negligence on the part of the defendant; whether the negligence was the negligence of the foreman in running the hand car too fast, up to a point which he knew to be dangerous, and which he did not warn the other men working on the hand car of, so that it was impossible for them, without extreme hazard to their lives, to avoid a collision; or whether the negligence was on the part of the officers in charge of the freight train in approaching a curve in a cut which obstructed the train from view, or passing a public crossing without giving warning by sounding the whistle or engine bell."

The defendant excepted to the Court's submitting to the jury the question of the section foreman's negligence and excepted to the submission of the freight train employees negligence.

The Court further charged:

"*If in any case of these respects there was actual negligence on the part of the defendant*, which placed plaintiff in a situation of extraordinary danger, something clear beyond the ordinary risk of his employment, and his injury was not in any degree owing to his own negligence at the time, the defendant would be liable for damages and be liable even though the plaintiff, when in a situation of imminent and apparent danger,

may have made a mistake on his part in attempting to escape from the danger, as by attempting to jump in the wrong direction."

The defendant excepted to the submission of the question whether there was negligence on the part of the section foreman, or on the part of the employees of the extra freight.

The Court next charged:

"But if, on the other hand, the injury to him resulted from his own act in attempting to jump from the hand car at a time when it was his duty to have remained on the hand car and assist the others in checking its speed and in removing it from the track so as to get out of the way, and when he had no reasonable cause to regard himself as being in extreme danger, or if defendant was entirely guiltless of any negligence; (if the foreman was not guilty of imprudence in running the hand car at the rate it was going; if the freight train did not approach a curve or crossing where it was the duty of the engineer to give warning, so that there was no negligence on the part of the defendant, then your verdict shall be in favor of the defendant.")

The defendant excepted to this instruction objecting again to the court submitting the case on the negligence of the section foreman, or on the negligence of the freight train engineer.

The court further gave to the jury the following instruction which was excepted to;

"If the jury find from the evidence that the hand car in question was a necessary implement in the carrying on of the company's work, and that the said hand car was not sufficiently provided with a sufficient brake to stop it within a proper and reasonable time, when in danger of collision with other trains on said road, *of which defect the*

plaintiff had no knowledge and could not reasonably be required or expected to have such knowledge, and that by reason of such defective brake plaintiff was injured, without contributing by his own negligence to such injury, then the company is liable to plaintiff in damages for such injury."

The court declined to direct a verdict for the defendant as requested and the defendant excepted. Record p. 88.

The court did not submit to the jury any negligence with respect to the telegraph operator, or any negligence with respect to the failure of the company to notify the section men of the extra freight's approach. This will appear quite material when we call attention to the grounds of affirmance in the Circuit Court of Appeals.

The plaintiff in error assigned in the Circuit Court of Appeals eighteen errors. Record pages 116-125. In this court the same errors are assigned in the record. Page 156. We shall in the argument waive a number of these assignments of error and rely on the following:

ASSIGNMENTS OF ERROR.

1. The Court erred in submitting to the jury the alleged negligence of the section foreman.

2. The Court erred in submitting the alleged negligence of the engineer.

3. The Court erred in not directing a verdict for the plaintiff in error and in submitting the alleged negligence of the company with respect to the hand car.

ARGUMENT.

[1] This case was tried and decided in the Circuit Court of Appeals after the decision of this court in the *Ross Case*, 112 U. S. 377, and before the decision of the *Baugh Case*, 149 U. S. 368. This explains how one or both of the lower courts (misinterpreting the Ross case) held that negligence of the section foreman or of the freight train engineer was the negligence of the company. The later decision of the same court in *N. P. R. R. Co.* v. *Smith*, 39 Fed. Rep. 993, is in full accord with our proposition and shows, if we mistake not, that the Court of Appeals has made a clear change of ruling since the case at bar was decided by it.

Where the negligence of a section foreman concerns matters as to which the company owes an affirmative duty to its servants, his negligence may perhaps be that of the company. For example, where his failure to keep the track in repair derails a train. There is authority for such a ruling. But the negligence of the foreman in running a hand car or in failing to tell his associates of an expected freight train, or in failing to keep a lookout, does not pertain to any of those affirmative duties which a master owes to a servant; it does not relate to the appliances or machinery furnished, or to the safety of the track, or to the selection of competent fellow workmen. On the contrary any failure of the foreman in these respects was a failure in his duties as an operative or workman; for it would be equally the duty

of each of the section men to tell his associates of an expected train, to keep a lookout and not to run the car at a negligent rate of speed. Consequently the foreman's failure was in respect of his duties as a servant, or workman, or laborer, and not in the exercise of any peculiar function as foreman, or in which he represented the railroad company, or with respect to which the company owed an affirmative duty to the laborers.

The principle settled by this Court in the *Baugh case* is as stated by Justice Brewer in that case:

Louisville & N. R. Co. v. Hedgard 160 U.S. 250

"Therefore, it will be seen that the question turns rather on the character of the act than on the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then the negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

There is no statute in the state of Washington changing the common law liability of a master to a servant. And in such cases it is now settled in this court that the federal courts will follow their independent judgment of the common law and will not be controlled by state decisions. But the Supreme Court of Washington in *Sayward* v. *Carlson*, 1 Wash. 43, adopted the rule which this Court decided in the *Baugh case*, using this language:

"We find in *Crispin* v. *Babbitt*, 81 N. Y. 516 what seems to us the most correct, brief statement

of some of the points to be regarded in cases of this kind, which has come to our notice. The court said, p. 520, 'The liability of the master does not depend upon the grade or rank of the employe whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. On the same principle, however low the grade or rank of the employe, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided in such inferior employe * * * Flike v. R. R. Co., 53 N. Y. 549 * * * The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employe performing it. If it is one pertaining to the duty the master owes to his servant, he is responsible to them for the manner of its performance. The converse of the proposition naturally follows. If the act is one which pertains only to the duty of an operative, the employe performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow servant for its improper performance. Wood, Master and Servant, Sec. 438."

[II] The court was in clear error in submitting to the jury negligence of the defendant based on negligence of the engineer of the freight train. The engineer of the freight train and the section foreman were fellow servants. *Randall* v. *B. & O. R. R. Co.*, 109 U. S. 478; *Quebec Steamship Co.* v. *Merchant*, 133 U. S. 375; *N. P. R. R. Co.* v. *Hambly*, 154 U. S. 349.

[III] The Circuit Court of Appeals considered the two exceptions above discussed in their opinion at pages 150 and 151 of the Record. In regard to the alleged negligence of the section foreman, the Court said:

"Standing alone the first situation would seem to involve the question as to whether the section foreman was a fellow servant of the plaintiff; but the conduct of the foreman in this case in operating the hand car cannot be wholly separated from the antecedent and then existing condition of the car itself. Had the company furnished a new handcar with proper brake appliances in place of the broken and disabled car, or repaired the latter with a new and effective brake, the imminent danger of collision with the freight train would not have occurred. The defendant is not liable if the negligence of a fellow servant is the sole cause of the accident, because being a fellow servant, his negligence is one of the risks for which the defendant as master did not assume to be responsible; but negligence of a fellow servant does not excuse the master from liability to a co-ser-servant for an injury which would not have happened had the master performed his duty. The situation indicated by the court must, therefore, be considered in connection with the surroundings and circumstances of the case, and particularly with respect to the testimony relating to the safety of the hand car. The jury could not have ignored this feature of the case under the instructions as given and taken in connection with other instructions. We cannot see that the defendant was prejudiced by it even if we assume that the foreman was a fellow servant with the plaintiff."

The vice in this reasoning is clear. There were three issues of negligence to try: first, fitness of the hand car; second, negligence of the section foreman; third, negligence of the freight train en-

gineer. As to the fitness of the hand car, the most plaintiff could claim was that the evidence raised an issue of fact for the jury as to its being fit or the reverse. The plaintiff was not entitled to have a verdict *directed by the court.* He has never advanced such a claim. And accordingly the trial court submitted this question as one of fact to the jury, with respect to which they might either acquit or convict the defendant. The verdict being a general one it cannot now be known which way the jury found on the issue as to fitness of the hand car, or plaintiff's knowledge of its condition. The jury were several times told in the charge (as we have shown) that they might find negligence of the defendant upon *either one of these three* points. The Circuit Court of Appeals was therefore clearly in error in assuming *as an established fact* that the jury found negligence of the defendant in furnishing an unfit car. Under the charge the jury may have found the car to have been a good one, or found that if bad the plaintiff knew it and assumed the risks, and may have rendered their verdict on the negligence of the section foreman.

The same answer lies to the argument of the Circuit Court of Appeals concerning the negligence of the freight train engineer. Record p. 151.

And it further appears that the court below under the *Ross case* did not consider the section men and the freight train engineer fellow servants. Record p. 151.

[IV]The Circuit Court of Appeals referred several times to the admission in defendant's answer to the effect, that it is the duty of the defendant to furnish laborers engaged in maintaining the track with necessary information as to the passing of trains on the defendant's road. This admission is at page 8, Record. But when the whole record is examined this admission will be found to be untrue if broadly construed, and in any event will be found to be immaterial.

The complaint, Record p. 1-2, contained an allegation, that it was the duty of the telegraph operator at Cheney to know the times of trains and to inform all the defendant's servants and employes, whose safety might be endangered thereby, of the times of such trains, and that it was defendant's duty to inform said telegraph operator and to so inform defendant's servants and employes as not to endanger them. The admission referred to in the court below must be read in connection with the sixth paragraph of the answer, Record p. 9. In this paragraph the answer denies that it was the duty of the telegraph operator at Cheney to inform the servants and employes of defendant of the times of trains, and denies that it is the duty of defendant to notify said operator of the same; denies that it is the defendant's duty to so operate and run its trains as to inform all its employes and servants in such a manner as not to endanger such servants while engaged in the service. Comparing the two paragraphs of the answer, it will be seen that the admission at most is only that

it is defendant's duty to furnish "*necessary*" information, leaving it to be determined in the case what information is necessary.

It is a self-evident proposition, the truth of which this court and every other sensible man knows, that railroad employes have only the schedule of regular trains; that it is impossible to notify section men of extra trains. That no extra train could ever be run under such a rule or regulation. Neither can they be notified when regular trains are late.

In the next place the testimony shows without contradiction, that it was part of the duty of section men to keep a constant lookout for trains; that they might be expected at any time. Record pp. 44-45-46-54-63-70-71-74.

The testimony, showing that it was the rule, regulation and practice of the company to run extra trains without notice to section men, and that even schedule trains were frequently late and running off from time, and that section men had no notice of the time of trains and were expected to look out for themselves, it is indisputable, that the plaintiff, having worked on the section four months, knew this custom and assumed the risks incident to it. *Larson* v. *Ry. Co.*, 43 Minn. 423. Therefore, the admission referred to in the opinion of the Circuit Court of Appeals is immaterial.

Moreover, the trial court treated it as immaterial and the charge shows that this question was not submitted to the jury. The jury were not allowed by the charge to predicate negli-

gence of the defendant on failure to give notice of the running of the extra freight. Therefore the verdict could not have been rendered on account of any such failure. The jury has not found that there was such a failure. Therefore, that issue of fact not having been submitted to the jury or passed on by them cannot in an appellate court be assumed to have been determined against the defendant.

[V] The trial court should have directed a verdict for the defendant. There is no testimony that the car was not equipped with a good and sufficient brake when furnished by the company and originally put in use. And there is considerable testimony that railroad laborers are in the habit themselves of taking off the brake, which comes from the factory on such cars, and putting on a brake like the one in use on the car in question when the accident happened. When plaintiff went to work on this section in May the car had no brake. The men used a stick, placing it between the spokes of the car wheel in order to stop the car. Record p. 30. When the car was broken (which the testimony shows to have been something like a month before the accident) the foreman Kirk and the section men fixed it up with some old lumber and an old wheel from some other car. They bolted to the side of the car, between the hind wheel and the front wheel, a 2x4 which the men worked by hand as a long lever, to press against the wheels when they desired to stop.

The foreman said this was a big improvement over the last brake and the plaintiff says he did not know any better and believed it. Record pp. 32-37-45-52-53-54-55-60-61-72-73-75-77. The testimony also shows on the pages referred to that the car was in the usual condition on the morning of the accident. It had been in exactly the same condition, except as to the improved brake, since the plaintiff had worked on the section. The testimony shows that the majority of the witnesses, some called for the plaintiff and some for the defendant, regarded this kind of a brake as better and more powerful so far as stopping the car quickly was concerned than a foot brake. There is no testimony whatever that the brake did not work on the morning in question. In fact the testimony shows that the hand car was nearly stopped when plaintiff jumped, and no one would have been hurt had he not jumped.

But whether the condition of the car raised an issue as to defendant's negligence or not, and whatever was the condition of the car the plaintiff knew all about it as well as any one. It was plainly his duty as one of the section crew to keep the car in repair, and if it needed repairs which the crew could not make to call the roadmaster's attention to them and have the car sent to the shops. The testimony shows that the plaintiff had been daily for four months at work with this car, running daily over the section (which was nine miles long), moving several times a day from one point to another, sometimes meeting trains, and

whether he met trains or not having to stop the car with its brake several times every day. He knew how the brake worked, he knew whether it was fit for the purpose intended. There was no pretence that he was ignorant, unskillful or inexperienced, or incapable of understanding the operations of the hand car and appreciating the risks which its use involved. The case is one in which the court should have told the jury that the plaintiff assumed the risks incident to the peculiar condition of this hand car and have directed a verdict for the defendant. *Tuttle* v. *Milwaukee Railway*, 122 U. S. 189; *Randall* v. *B. & O. R. R.*, 109 U. S. 478; *Powers* v. *New York Lake Erie & Western R. R.*, 98 N. Y. 274; *McGrath* v. *Railroad Co.*, 18 Am. & Eng. R. R. Cases, 5; *Sullivan* v. *India Manufacturing Co.*, 113 Mass. 398; *Gilbert* v. *Guild*, 144 Mass. 601.

C. W. BUNN,
Counsel for Plaintiff in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

No. 184.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

R. J. DANSON, Administrator of Estate of Hugh Charless, deceased.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

REESE H. VOORHEES,
A. K. McBROOM,
L. H. PRATHER,
For Defendant in Error.

McGILL & WALLACE, LAW PRINTERS, WASHINGTON, D. C.

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STATEMENT.

The plaintiff below, Hugh Charless, was a section hand on the defendant's road, and at the time of injury, August 28, 1886, was, with the foreman of the gang and several other men, driving a handcar over the section. He was working the lever at the front end of the car. As the car approached a curve and cut on the road, going west, a freight train at rapid speed, going east, rounded the curve and appeared in the cut without sounding the engine whistle or giving other indication of its approach. The plaintiff had no knowledge whatever of this train until immediately before it appeared in the cut, at which time the foreman of the gang said he had been told at the station, from which the hand car had started, that a train was coming over the road and he thought it was about due at that point. Thereupon the train rounded the curve which, together with the smoky

condition of the atmosphere, had, theretofore, obscured it from sight. Those on the hand car endeavored to stop it, but it, being supplied with an insufficient brake, of which insufficiency the plaintiff was unaware, was checked with difficulty and so slowly as to make the plaintiff think that it would collide with the rapidly-approaching train, to the peril of his life. In this fear he jumped, but, owing to articles piled on either side of him on the car, his efforts were so impeded that he alighted on the track instead of at its side, was struck by the car and fell between the rails, and, as he lay upon the ground, threw his foot up to the end of the moving car to prevent its running over him. So great, however, was its speed that his efforts could not stop it. It rolled upon him, doubling him up, putting his feet where his head was, its momemtum being so great as to break his back and, in contact with his effort to stop it and his body, to raise the front end of the car from the track.

The other men on the car, it being thus stopped, jumped from it, and as quickly as possible pulled it from the track, and, as one of the plaintiff's legs had caught in the cogs under its bed, pulled him with it, and as they thus dragged his body over the track the train rushed by, blowing sand and dirt on his head as it lay near the rail.

The plaintiff was at the beginning of life, but twenty-five years of age, a strong, perfectly healthful, vigorous man.

The injury produced in the plaintiff complete paralysis from the point of fracture down. All power over his lower extremities, and over the internal organs that are subject to voluntary control, was lost to him, and this condition was permanent. There was crushed out of him usefulness, health and happiness. (R., pp. 39, 65,

66, 67.) He was made a helpless wreck, dependent for food, clothing, motion and continued life on charity. (R., pp. 34, 38, 39.) The jury in the United States Circuit Court for the Ninth Circuit awarded him $18,250 damages. For this amount judgment was rendered, and this judgment was affirmed by the United States Circuit Court of Appeals, in the October term of 1891. (R., p. 134.) The plaintiff died on May 23, 1892. (See suggestion of death and motion for substitution of administrator.)

The negligence of the corporation in the management of the railroad, which caused the injury, is of a startling character. It is shown as follows:

1. The hand car had no proper brake, but, as a substitute, a piece of board nailed to the side of the car by the foreman of the section gang, which, in its action, was insufficient to stop the car. (R., pp. 32, 60, 61, 37, 58, 74, 75.)

2. The negligent management as to the car is further shown by the fact that the machinery was so out of order that the cogs slipped (R., pp. 58, 59); that a pin holding parts of it together would, during its working, drop out (R., p. 38); that the wheels were not mates, two of them being old ones picked up by the foreman to replace one properly belonging to the car when it became broken (R., pp. 59, 77); that the foreman had the work of replacing the broken wheel by the odd wheel done by a *gunsmith* and not at the shops (R., p. 77), and the wheel so put on was loose (R., p. 61); that the foreman had applied for a good wheel and did not get it (R., pp. 32, 61); and that he either applied for a new car and did not get it, or, knowing the condition of the one he had, did *not* apply for another. The car, in this condition, was under the observation of the roadmaster. (R., pp. 32, 58, 64, 69.)

3. There was a crossing immediately on the other side of the curve from the hand car, and the officers of the freight train, coming from the opposite direction to that of the hand car, did not sound the whistle of the engine either at the crossing or on approaching the curve and cut, or give any other warning, nor attempt to stop the train on suddenly, under these circumstances, coming upon the hand car. (R., pp. 37, 41, 57, 76, 78, 79.)

4. The freight train that rounded the curve was the *second* section of an *extra* train, the *first* section of which the men and hand car had passed standing at the station of Cheney. (R., p. 32.) There were no flags on this first section to show that a second section was following. (R., pp. 32, 46, 48, 56, 57, 61, 71, 76.)

5. The foreman of the section gang was verbally informed by the men of the first section of the extra freight train at Cheney that the second section was so close behind them that they had seen it; that it was coming very fast in order to make a point in Montana without interfering with the regular trains (R., p. 32), and this information the foreman kept to himself, and allowed the defective hand car to be propelled close to the curve and close to the point where he thought the second section must be. (R., pp. 32, 48, 56.)

6. The telegraph operator at the station at Cheney, where the hand car stopped, does not appear to have given anyone of the section gang warning as to the approach of the second section of the extra freight, though the hand car and first section were standing at the station at the same time. (R., pp. 32, 48, 56.)

We have as the scene of this occurrence a stretch of track probably of three or four miles, and the various acts out of which this disaster grew were probably done within an hour. In that brief period and that small

space the officers of the second section were guilty of marked negligence; the conductor of the first section was guilty of marked negligence; the foreman was guilty of marked negligence; the telegraph operator had fallen short of his duty; while the negligence as to the hand car had been of long continuance.

The condition of things leading up to and causing this injury is that of complete demoralization on the part of the working force of this road, which, irrespective of the question of fellow-servant, could have but one cause, viz., incompetent, inefficient, and thoroughly negligent management on the part of the corporation itself.

BRIEF.

The assignments of error in this court are those made and passed upon in the Circuit Court of Appeals.

First Assignment of Error. (*R., p. 117.*)

The complaint (R., pp. 1–5) alleges, among other things, plaintiff's employment by defendant and defendant's duty to supply plaintiff with competent and efficient appliances for the proper discharge of plaintiff's duty; that in carrying on his work it was necessary for plaintiff to use a hand car; that the hand car furnished by defendant was defective in not being supplied with a sufficient brake so as to properly stop the car, of which defect plaintiff did not know, but that the defendant knowingly and negligently caused him to use such defective car; that, owing to its defective and insufficient character, the said brake failed to stop said car while plaintiff was performing his duty on said car, because of which plaintiff, without his fault, was injured.

This is well pleaded.

1 Estee's Pleading and Forms, 603, 604;
Maxwell on Code Pleadings, pp. 251–257.

3. There was a crossing immediately on the other side of the curve from the hand car, and the officers of the freight train, coming from the opposite direction to that of the hand car, did not sound the whistle of the engine either at the crossing or on approaching the curve and cut, or give any other warning, nor attempt to stop the train on suddenly, under these circumstances, coming upon the hand car. (R., pp. 37, 41, 57, 76, 78, 79.)

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This is well pleaded.

1 Estee's Pleading and Forms, 603, 604;
Maxwell on Code Pleadings, pp. 251–257.

The facts, if true, make the defendant liable, and therefore constitute a good cause of action.

Northern Pacific R. R. Co. *v.* Herbert, 116 U. S., 642;
Hough *v.* Railway Co., 100 U. S., 213.

Second Assignment of Error. (*R., p. 117.*)

The objection made was to the plaintiff giving his evidence in narrative form without special interrogation as to the particular matters thereof. (R., pp. 30, 31.)

It is entirely within the court's discretion as to whether a witness shall or shall not give his testimony as a continuous narrative.

Thompson on Trials, sec. 354;
3 Chitty's General Practice, 894.

Defendant's counsel did not point out as objectionable any specific part of plaintiff's testimony, or move to strike such part out. The narration, on reaching any statement considered by counsel objectionable, should have been arrested, and that specific part pointed out, objected to, the grounds of objection stated, and a motion made to strike it out.

Thompson on Trials, sec. 719;
Gould *v.* Day, 94 U. S., 405;
Moore *v.* Bank of Metropolis, 13 Pet., 302;
United States *v.* McMasters, 4 Wall., 680.

To the general objection made by defendant's counsel that the witness was including hearsay evidence in his testimony, the court responded by cautioning the witness not to repeat matters told him.

The testimony objected to was not immaterial nor incompetent because hearsay. The statements made to plaintiff by Kirk, the foreman of the section gang, related to the promise of the defendant to furnish a new car, or

to the repair of the old one, which was competent evidence (Cooley on Torts, sec. 559, quoted in Hough *v.* Tex. and Pac. R. R. Co., 100 U. S., 213); or were constituent parts of the transaction and a part of the *res gestæ*. (R., p. 32.)

Stephen's Dig. Law of Evidence, p. 6.

The statements made to plaintiff by Hooten (R., pp. 34–5), were competent as aiding in showing plaintiff's physical condition, his complete dependence on others, and his inability to earn money. If it was incompetent, its only alleged effect to the injury of the defendant was in showing a right to damages because the defendant did not take care of the plaintiff *after* his back was broken. (R., p. 35.) If incompetent in this respect, its effect was cured by the court, who said at the time of its admission: "It is proper only as showing his condition and capacity to earn money. He can not recover damages except for the injuries received on the hand car." (R., p. 35.) And in its charge the court instructed the jury that no damages could be awarded except for the injury received from the hand car, and "the amount is not to be enhanced by any conduct, whether commendable or otherwise, on the part of the railroad company subsequent to that time." (R., pp. 91, 92.) This testimony, if incompetent for any reason, could do the defendant no harm, and its admission is not reversible error.

Lancaster *v.* Collins, 115 U. S., 222.

Third Assignment of Error. (*R., p. 121.*)

For the objection taken to the question and answer no ground was specified, the bill of exceptions showing, after the question, simply "objected to; objection overruled; exception allowed." (R., p. 39.) The ground of objection

not being given, the exception is unavailing and can not be considered.

Toplitz *v.* Hedden, 146 U. S., 250, and cases cited;
Thompson on Trials, secs. 693, 694;
Camden *v.* Doremus, 3 How., 530.

Whether Kirk, the foreman, had "power to hire and discharge men," as was asked the witness, tended to show whether he and the plaintiff were fellow-servants so as to exempt the master, the test being, as said by the court in B. & O. R. R. Co. *v.* Baugh (149 U. S., 368), not the *name* of the employé's position, but the actual duties performed by him.

If the question was not competent it could do the defendant no harm, and its admission is not reversible error.

Lancaster *v.* Collins, *supra.*

Assignments of Error, 4, 5, 6, 7. (*R., p. 121.*)

These assignments of error are based on objections and exceptions to testimony.

The ground of objection was not specified in any instance. The bill of exceptions showing the formal statement "objected to; objection overruled; exception taken." (R., pp. 56, 59, 60)

These exceptions can not be considered.

Toplitz *v.* Hedden, 146 U. S., 250;
Thompson on Trials, secs. 693, 694;
Camden *v.* Doremus, 3 How., 530.

The testimony objected to was material and competent, tending to show the negligence of the defendant.

Eighth Assignment of Error. (*R., p. 122.*)

Exception was taken to the denial of defendant's motion for a dismissal of the cause and non-suit against the plaintiff when plaintiff rested his case. (R., p. 68.)

The court had no power to direct a non-suit without the plaintiff's consent. Plaintiff was entitled to his trial by jury.

Dewolfe *v.* Raband, 1 Pet., 476;
Elmore *v.* Grymes, 1 Pet., 469;
Crane *v.* Morris, 6 Pet., 598;
Castle *v.* Bullard, 23 How., 172;
Selsby *v.* Foot, 14 How., 218.

Ninth Assignment of Error. (*R., p. 122.*)

No objection was made, no ground assigned, and no exception taken to the requirement of the court, after denying the motion for non-suit, that defendant should proceed with its defense, and defendant's counsel made no motion asking that the court direct the jury to return a verdict for defendant. (R., p. 68.)

Even though such motion had been made after plaintiff rested, defendant had not rested its case, but proceeded to take testimony in its own behalf. Under such circumstances the court's refusal to direct a verdict for defendant can not be assigned as error.

Accident Insurance Co. *v.* Crandall, 120 U. S., 527;
Grand Trunk Ry. Co. *v.* Cummings, 106 U. S., 700;
Robertson *v.* Perkins, 129 U. S., 233.

Tenth and Eleventh Assignments of Error. (*R., pp. 122–3.*)

The allegation in the tenth assignment is that, on the defendant's motion, after both sides had introduced their evidence and rested, the court should have taken the case from the jury and directed a verdict for defendant, because there was nothing in the evidence showing liability on the defendant, because plaintiff was injured by the negligence of his fellow-servants, and because his injury was due to his own contributory negligence.

Plaintiff was injured because defendant failed to supply him with a competent and adequately safe hand car. It was the defendant's positive duty to provide for plaintiff sufficient, competent and adequately safe machinery and appliances for the discharge of plaintiff's duties. Any negligent act of any agent of the defendant, causing the defendant to default in the performance of its duty, was the negligence of defendant. The risk incidental to defective appliances and machinery was not within the plaintiff's contract of service.

Northern Pacific R. R. Co. *v.* Herbert, 116 U. S., 642;

Hough *v.* Railway Co., 100 U. S., 213;

Gardner *v.* Michigan Central Railroad Co., 150 U. S., 349;

Washington and Georgetown R. Co. *v.* McDade, 135 U. S., 554.

The evidence shows that the hand car did not have a properly made brake, with a curved shoe to grasp a large surface of the wheels, such as is customarily put on hand cars by manufacturers, nor a sufficient and adequately safe one, but as a substitute had nailed flat to its side, between the wheels, a straight piece of board in a vertical position, which, when pressed on at the upper end, rubbed against the wheel, coming in contact with the wheel only to the extent of the edge of the board across the track surface of the wheel. (R., pp. 32, 37, 58, 60, 74, 75); that the car was defective in other particulars (R., pp. 38, 58, 59, 77); that the defendant knew or ought to have known its condition; that when the freight train was seen in the cut coming around the curve "a very heavy man" tried to stop the hand car by pressing on the upper end of this board, and, though

his effort was aided by the men at the lever, the car did not stop, because of the insufficiency of the brake (R., pp. 32, 33, 59, 60, 62, 64); that plaintiff, in fear of peril to his life, jumped because the car did not stop; that the plaintiff's body stopped the car, the momentum of which at the time had great force (R., pp. 33, 57, 78, 79); that the other men did not leave the car till the plaintiff's body stopped it; that at once the car and plaintiff's body were dragged from the track, and immediately thereafter the train passed over the spot, going, as it passed, according to defendant's own witness, ten miles an hour (R., pp. 33, 60, 78). These facts are, practically, uncontradicted. The evidence shows that the officers of the freight train did not sound the whistle as the train, in a smoky atmosphere, approached the crossing, curve and cut. (R., pp. 32, 33, 37, 41, 57.) These facts were entirely uncontradicted. No substantial effort was made to stop the train when, under these circumstances, it came suddenly on the hand car. (R., pp. 32, 33, 37, 41, 57, 76, 78, 79.) The evidence further tended strongly to show that the conductor of the first section of the freight train (vice principal, Chi. & St. Paul R. R. Co. *v.* Ross, 112 U. S., 377) had not placed flags upon his train to give warning of the coming of the second section, and no effort was made on behalf of defendant to contradict this or to show the contrary. (R., pp. 32, 46, 48, 56, 57, 61, 71, 76.) It was proven and undisputed that plaintiff had no knowledge of the approaching train till immediately before it was seen rounding the curve. (R., pp. 32, 48, 56.)

The case can not be taken from the jury and a verdict directed, unless, as a conclusion of law, no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish, whether the facts be disputed or not; if different minds might hon-

estly draw different conclusions from the evidence, the case should be left to the jury.

Texas and Pacific R. Co. *v.* Cox, 145 U. S., 593;
Gardner *v.* Michigan Cent. R. R. Co., 150 U. S. 349;
Railroad *v.* Stout, 17 Wall., 657.

CONTRIBUTORY NEGLIGENCE.

There was no contributory negligence on the part of the plaintiff.

The plaintiff was told by the foreman of the section gang that he had applied for a new car, and that the roadmaster had said that he did not then have one, and told him, the foreman, to repair the car they had, so as to use it until he, the roadmaster, could get another for them. (R., pp. 32, 58.) The plaintiff had seen the foreman and roadmaster talking together. (R., p. 50.) The foreman did repair the car to use, as told plaintiff, until the other one was supplied them, putting a brake on it, which, he assured plaintiff, was a good brake and would prevent a train catching them (R., 38, 40, 75, 77), and the plaintiff thought the brake was "first class." (R. p. 43.)

The plaintiff, even if aware that the brake was defective, was not guilty of contributory negligence in relying on the promise of another car and using the defective car for a reasonable time while awaiting the new one.

Hough *v.* Texas and Pacific R. R. Co., 100 U. S., 213, and authorities therein cited.

The plaintiff did not know that the brake supplied by the repairer of the car would not do the work of a sufficient brake. (*Supra.*) While supplied with this brake the car had not met on the track a special train requiring prompt action by the brake, and he had not

seen it so tested, nor had he ever used the brake. (R., pp. 44, 40.) He was not called on to make extensive tests, but had the right to presume that the master was doing its full duty.

Plaintiff was an unskilled common laborer and without experience with hand cars, that particular hand car being the only one with which he had worked. (R., pp. 42, 43). He rightfully relied on the assurances of the man directed or allowed by the master to repair the car that the brake was a sufficient one. The car was seen by the roadmaster, the head of the repair department, every few days, and the result of the foreman's repairing was ratified by his silent acquiescence, if not previously directed by him. (R., pp. 69, 70, 71.)

The test is, did the plaintiff exercise that degree of care and caution which was incumbent upon a man of his class, of ordinary prudence, and *under the circumstances in which he was placed?*

Kane *v.* Northern Cent. R. Co., 128 U. S., 91.

The fact *per se* that he *saw* the brake does not charge him with knowledge of its insufficiency.

Meyers *v.* Hudson Iron Co., 150 Mass., 125.

In jumping from the hand car, under the circumstances, plaintiff was not guilty of contributory negligence. It is probable that, if the hand car had not been stopped by his body, a collision with the train would have occurred. But in a sudden emergency, called upon to act quickly to avoid impending danger, one is not held to the same degree of care as under ordinary circumstances.

Union Pacific Railway Co. *v.* McDonald, 152 U. S., 262;

Kane *v.* Northern Cent. R. Co., 128 U. S., 91;

Grand Trunk Ry. *v.* Ives, 144 U. S., 408.

The question of contributory negligence was properly left to the jury.

Kane *v.* Northern Cent. R. Co., 128 U. S., 91;
Washington and Georgetown R. Co. *v.* McDade, 135 U. S., 554;
Sioux City and P. R. Co. *v.* Stout, 17 Wall., 657.

The foregoing answers also the eleventh assignment.

Assignments of Errors 11, 12, 13, 14, 15 and 16. (*R., pp. 123, 124, 125.*)

These assignments are based on the exceptions taken to various parts of the court's charge to the jury. And none of the exceptions to the court's charge were taken before the jury left the bar.

"That the court, in submitting this cause to the jury, gave to the jury, among others, the following instructions, which immediately upon the retirement of the jury were excepted to by the defendant, through his counsel; which exceptions were by the court then and there allowed; that the instructions so excepted to and the exceptions made thereto, and the allowances thereof, are as follows, to wit." (Bill of Exceptions, R., p. 85.)

Exceptions to the court's charge, taken after the retirement of the jury, can not be considered by this court.

In Phelps *v.* Mayer (15 How., 160), the court said:

"There is nothing in the certificate from which it can be inferred that this exception was reserved pending the trial and before the jury retired. * * * It has been repeatedly decided by this court that it must appear by the transcript not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. * * * If it is not done, the charge of the

court or its refusal to charge as requested form no part of the record, and can not be carried before the appellate court by writ of error."

Turner *v.* Yates, 16 How., 29;
Walton *v.* The United States, 9 Wheat., 657;
Boston *v.* Forsyth, 20 How., 532;
The Pacific Express Co. *v.* Malin and Colvin, 132 U. S., 531;
Stewart *v.* Wyoming Cattle Ranch Co., 128 U. S., 383;
Mobile and M. R. Co. *v.* Jurey, 111 U. S., 584;
Foster's Fed. Pr., sec. 377.

There should be no relaxation of the rule just stated. A remand for a new trial will be, in this case, a final judgment for the defendant, because the death of the plaintiff precludes another trial. (See suggestion of death, &c.)

The grounds of objection upon which these assignments are based are stated in very general terms and are somewhat obscure, but upon their broadest interpretation they raise the following questions:

NEGLIGENCE OF THE CONDUCTOR OR ENGINEER OF THE FREIGHT TRAIN AT THE CURVE.

Is the master liable for the negligence of the officers of the second section of the extra freight train in not sounding the whistle, or giving any warning on approaching at more than the usual speed, in a smoky atmosphere, the crossing, curve and cut, and in not attempting to bring the train to a stop on suddenly, under these circumstances, coming upon the hand car?

If the failure to give warning of the approaching train was due to the negligence of the conductor he was a vice principal and the master is liable.

Chicago and St. Paul R. R. Co. *v.* Ross, 112 U. S., 377.

NEGLIGENCE OF THE ENGINEER.

If such failure was the result of the negligence of the engineer, and not that of the conductor, the master is still liable. The risk of this negligence was not within the plaintiff's contract of service. The engineer and the plaintiff were not engaged in the same or common work.

The servant, plaintiff in the case at bar, when injured, had not the power of self-protection against dangers arising from absence of proper control of the dangerous agency operated by the owner and master for the master's profit; and the rule imposing the duty on the owner of a dangerous agency, in whose sole control it is, to control it within the bounds of safety, is unimpaired and protects such servant; and no contract can be implied to relieve such owner of such duty.

I.

THE GENERAL RULE.

Where one owns and uses a thing with the nature and operation of which people are not generally acquainted, and which, when not properly controlled, is dangerous to the public, and the control of which is exclusively in the owner of such thing, or one acting for him, in such case the *value of human life* and the *dangerous character* of the thing make it public policy and create a rule of law that the owner and beneficiary, and the one having sole control, shall be held to the extremest care which reason-

able human foresight, skill, and caution can produce, and which is necessary to protect human life from the dangerous thing he has set in operation.

Broom's Legal Maxims, pp. 390–391;
Potter *v.* Faulkner, 1 B. & S., 805;
Shearman & R. on Negligence, secs. 683–691;
Rylands *v.* Fletcher, L. R., 3 H. L., 330;
Dixon *v.* Bell, 5 M. & S., 198;
Horace Smith's Negligence, pp. 142–143;
1 Addison on Torts, p. 23 and note n, and sec. 544;
Union Pacific Ry. Co. *v.* McDonald, 152 U. S, 262.

Nor can the one charged with the *duty* avoid the consequences of non-performance by saying that the default was due to the negligence of an agent to whom he had delegated the duty, because *qui facit per alium facit per se*, and because—

"The maxim of *respondeat superior* is bottomed on this principle: That he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it." (Hall *v.* Smith, 2 Bing., 160.)

The plaintiff was lawfully on the track. He was not a trespasser. Under these circumstances, without an exception being made to the general rule changing his status before the law, the value of his life or health to himself and the state and the dangerous and deadly character of the agency operated and enjoyed by the defendant enforce the foregoing principles in behalf of the plaintiff, to wit, *sic utere tuo ut alienum non laedas; qui sentit commodum sentire debet et onus*, and *respondeat superior*.

It is true that it has usually been urged and frequently ruled that *public policy* operated to relieve the owner and beneficiary from the duty of taking care, as to a *servant*, on the theory that, if such servant were left exposed to

dangers, he would be more diligent on that account, to the benefit of the public. This assumes a duty to the public on the part of the servant *greater* than is owed by the owner, because for negligence by the servant it makes the proper penalty death or maiming by increasing his exposure to these results in order to force him to great diligence, while the owner is only exposed, as a penalty for his negligence, to a money loss. This court repudiated this cruel, unjust, and fallacious reasoning in Chicago and St. Paul R. R. Co. *v.* Ross (112 U. S., 377), and quoted very fully from the opinion in R. R. Co. *v.* Stevens (20 Ohio, 415), and certainly not with disapproval, in which it was said:

"We think the policy is clearly on the other side. It is a matter of universal observation that, in any extensive business where many persons are employed, *the care and prudence of the employer is the surest guaranty against mismanagement of any kind.*"

II.

THE IMPLIED CONTRACT, OR EXCEPTION TO THE GENERAL RULE.

Now, it has been very generally ruled, both by this court and others, that a *fiction* of the law in certain cases relieves the owner and operator of a railroad from the necessity of seeing to it that, through negligent management, his dangerous agency hurts no one—that the protection of the general rule is taken from certain citizens when they serve the railroad.

The *fiction* of the law makes the servant's voluntary act except him from the protection of the general rule. It raises an *implied* contract, a contract *presumed* to exist, by which the servant has agreed to take the risk

of the negligence of other servants of the same master engaged in the same work, to whom is delegated more or less control of the dangerous agency.

Substantially no other reason has been assigned. But for his own implied contract the general rule would protect him.

Chicago and St. Paul R. R. Co. *v.* Ross, 112 U. S., 377;

Gardner *v.* Michigan Cent. R. R. Co., 150 U. S., 349;

The Baltimore and Ohio R. R. Co. *v.* John Baugh, 149 U. S., 368;

Farwell *v.* The Boston and Worcester Railroad Corporation, 4 Met., 49;

Hutchinson *v.* York, New Castle and Berwick Railway Co., 5 Exch., 351;

McNaughton *v.* Caledonian Railway Co., 19 Court of Sess. Cases, 273;

Bartonshill Coal Co. *v.* McGuire, 3 McQueen H. L. Cases.

(*a*) THE LAW WILL NOT LIGHTLY PRESUME THAT A REASONABLE BEING WOULD AGREE THAT THE ONE IN WHOM RESTS THE SOLE CONTROL OF THE DANGEROUS AGENCY AND THE DUTY TO CONTROL IT, SHALL NOT CONTROL IT, AND FURTHER AGREE TO EXPOSE HIMSELF TO ITS DANGERS UNCONTROLLED UNDER CIRCUMSTANCES WHICH STRIP HIM OF THE POWER OF SELF-PROTECTION AGAINST THEM.

In the case at bar the plaintiff, as he stood on the defendant's car, was, in relation to the force or work represented by the engine and the servant engaged in that work, or a part of that force, whose negligence caused the injury, an absolute stranger, without any power either to control such force and servant in their relation to himself or to control himself in relation to them.

"Implied contracts are such as *reason* and *justice* dictate, and which, *therefore*, the law presumes that every man undertakes to perform." (2 Bl. Com., 443.)

An unreasonable and unjust contract can not be implied.

The reason usually assigned to support the implied contract is the fact that the servant *knows* that there are other servants employed by the master, and that servants are sometimes negligent, and that, they being engaged in the same employment, that negligence is a risk incident to that employment, and, therefore, he agrees to take the risk, and is paid for doing so.

The Farwell Case, and subsequent leading cases.

This reasoning does not appear sound. The servant knows at the same time that *masters* are sometimes negligent, and that such negligence is a risk incident to the employment, yet he is never held to agree to accept the risk of the *master's* negligence.

There is no reason in his *knowledge* of probable negligence on the part of other employés which *per se* can justly take from him that protection which the value of his life, the deadly agency, and the exclusive control of it in the master declare he shall have; nor can the master be justly relieved of the duty imposed on him to exercise his exclusive control over his dangerous agency, simply because one who knows that it is dangerous agrees to come in such contact with it that he may be injured if it is not properly controlled.

A passenger, or other person, lawfully on the premises of the corporation, injured by the negligent failure of the engineer to signal, would not have been less able to protect himself than was the plaintiff in the case at bar. Such person would have been only equally ignorant of the approach of the train, only equally ignorant of the

competency or incompetency of the engineer and other train men, and only equally unable to control either the men or the force they were operating, or himself in relation to such men and force.

The *passenger, or other person*, thus only equally unable to protect himself, *knows* that servants may be negligent; *he* knows that the agency he voluntarily places himself in contact with is dangerous; he knows that the servant's negligence is apt to maim or kill him. All this knowledge he has, yet the law, on that account, does not imply a contract on *his* part that in regard to him the corporation shall not do its duty.

Nor does the money which passes from the passenger to the corporation draw a distinction between him and the plaintiff. The corporation's duty to control its deadly agency must be performed though the passenger, or other person lawfully on its premises, pays nothing.

Philadelphia and Reading R. R. Co. *v.* Derby, 24 How., 485;
McKone *v.* Mich. Cent. R. Co., 51 Mich., 601;
Texas, &c., R. Co. *v.* Best, 66 Tex., 116;
Ill., &c., R. Co. *v.* Hammer, 72 Ill., 347;
Western, &c., R. Co. *v.* Turner, 72 Ga., 292;
Larkin *v.* New York and N. R. Co., 46 N. Y. S. R., 658;
Louisville, &c., R. Co. *v.* Phillips, 112 Ind., 59.

The mere *existence* of a contract by which the servant is to do something for the master (work) and the master is to do something for the servant (pay wages), does not *per se* imply an additional contract. The *passenger* has a contract with the master by which he is to do something for the master (pay him money), and the master is to do something for him (transport him), yet no additional contract is implied to relieve the master of his duty.

It is further strongly held by this court that, as to the passenger, the law will not *permit* the corporation, even for a consideration and by *express* contract, to relieve itself of its duty to control its dangerous agency.

New York Central R. R. Co. *v.* Lockwood, 17 Wall., 357;
Grand Trunk R. Co. *v.* Stevens, 95 U. S., 655;
New Jersey Steam Nav. Co. *v.* Merchant's Bank, 6 How., 344;
Bank of Kentucky *v.* Adams' Express Co., 93 U. S., 174;
York M'f'g Co. *v.* Illinois Cent. R. R. Co., 3 Wall. 107;
United States Express Co. *v.* Kountze, 8 Wall., 342.

Appreciation of the fact that the duty is on the corporation to control its dangerous agency irrespective of contract, and an analysis of the cases adjudicated by this court, bring the inevitable conclusion that the protection given the passenger, or other person lawfully on the premises, and the employé (when he gets it), rests ultimately on the same principles, viz., one must so use his own as not to infringe the rights of others, and *respondeat superior*.

Phila. and Reading R. R. Co. *v.* Derby, *supra*.

In Union Pacific R. R. Co. *v.* Fort (17 Wall., 655), it was held that the liability of the corporation for the injury of one servant by the negligence of another servant rests on the rule of *respondeat superior*.

The factors enforcing these rules in the case of a passenger, or other person lawfully on the premises, are:

(*a*) The beneficial ownership, operation, and exclusive control of the dangerous agency in the corporation.

(*b*) The right of human life and safety.

In Steamboat *New World v.* King, 16 How., 469, this court said:

"In the Philadelphia and Reading Railroad Company *v.* Derby, 14 How., 485, which was a case of gratuitous carriage of a passenger on a railroad, this court said: 'When carriers undertake to convey persons by the *powerful* but *dangerous* agency of steam, *public policy and safety* require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross.' We desire to be understood to reaffirm that doctrine, as resting not only on *public policy*, but on *sound principles of law.*"

Philadelphia and Reading Railroad Co. *v.* Derby, *supra;*

Sherlock *v* Alling, 44 Ind., 184;

Caldwell *v.* New Jersey Steamboat Co., 47 N. Y., 282.

"For the law will (as we have seen), *in tenderness to human life and human limbs*, hold the proprietors liable for the slightest negligence." (Story on Bailments, sec. 601 a.)

All these factors are present in the case of the plaintiff, viz.:

(*a*) The dangerous agency.

(*b*) The beneficial ownership and operation in the corporation.

(*c*) The control of the dangerous thing in the corporation, exclusive as to the plaintiff.

(*d*) The right of human life and safety.

Yet, it is urged, this servant, who, from the value of his life and from his helplessness, remains entitled to the same protection, relieved the corporation from its *duty,*

and accepted the risk of the negligence of many irresponsible men, and this because he *knew* that servants might be negligent, and injury to him might follow (as also knew the passenger or other person lawfully on the premises), and in consideration of a *fictitious* part of his wages, which same condition of irresponsibility on the part of the one having control, the law would not permit the *passenger* to bring about at any price.

The reasoning originally advanced to support the implied contract, it is submitted, is not sufficient. There must be something more tangible to induce a reasonable man to voluntarily relinquish any existing protection from such dangers, and something more tangible in the way of justice to support the master in his demand to be relieved of the duty which the value of human life places on him to control *his own, profitable, dangerous agency.*

While this particular servant in the case at bar, injured by another servant of the same master, is identical, in his relations to such other servant, to the master and in his rights, with a passenger, or other person lawfully on the master's premises, if so injured by the same servant, yet there are distinctions as to *other* servants on which naturally and logically rests the master's exemption from liability for injury to one servant by the negligence of another.

(*b*) THE REAL REASON AND THE JUST REASON UPON WHICH THE IMPLIED CONTRACT MAY REST IS—

WHEN A PERSON BECOMES A PART OF THE FORCE BY WHICH A GIVEN PIECE OF WORK IS BEING PERFORMED, AND INJURY RESULTS TO SUCH PERSON FROM THAT FORCE, HE HIMSELF MAY GENERALLY BE CONSIDERED AS INSTRUMENTAL IN INFLICTING THE INJURY.

Such person from being a component part of the machinery, or force, has such intimacy with its various

elements, such knowledge of its workings, such familiarity with its possible dangers, that he may reasonably assume the control of it so far as is necessary for his own protection; or, where he can not control it, rely upon his knowledge of it and the fact that it operates under his observation to enable him to step out of danger's way. Not to do so would be to contribute to his own injury.

The result of this is that the master, as to this person, ceases to be the *sole* controller of his dangerous agency, and may justly ask to be relieved of the *duty* imposed on him under circumstances where he necessarily exercises *sole* control, either through himself or agent.

When such a condition exists the servant's implied contract becomes *reasonable*, and the demand of the operator of the dangerous agency to be relieved of liability becomes *just*.

The servant failing to take care of himself, having reasonably full power to do so, and where he was a part of the force in operation, could not reasonably demand that another should be liable for the injurious results.

Where, therefore, the intimacy with the work out of which the injury grows, and with the servant whose negligence causes it, is not such as to permit the injured servant to exercise reasonable power of self protection, the injured servant and the negligent servant are not engaged in the same or "common work." The risk of the negligence of a servant so related to him is not an "ordinary risk" of his employment. Such risk is not within the injured servant's contract of service.

Flike *v.* Boston and Albany R. R. Co., 53 N. Y., 549;
Miller *v.* Union Pacific R. R. Co., 12 Fed. Rep., 600;
NcNaughton *v.* Caledonian Railway Company, 19 Court of Sess. Cases, 273;
O'Donnell *v.* Allegheny Val. R. R. Co., 59 Pa. St., 239.

We have here two men and a piece of machinery. One of the two men is the owner of the machinery and enjoys the profits from its operation. The operation of the machinery occasions loss. Neither man was guilty of wrong-doing, or personal negligence, or was personally able to control the machinery, or able in any way, as regards the machine, to prevent the loss. Who *ought* to bear the loss? *Qui sentit commodum sentire debet et onus.*

It is submitted that while the proposition has not been laid down in terms—that where the servant does not have the power of self-protection there is no implied contract and, therefore, no exception to the general rule of care which governs the owner, beneficiary, and controller of the dangerous thing—yet the absence or the presence of this power of self-protection has figured in so many of the leading cases, and has been commented upon so generally as having weight in *aiding* in producing the conclusion reached, that there is much authority for making it the controlling element in the case at bar. It became influential when the exception to the general rule, exempting the master from liability to one servant for injury inflicted by the negligence of another, was first applied, and it has remained influential down to the present time. Thus, in Priestley *v.* Fowler (3 Mees. and W., 1), which inaugurated the exception to the general rule, the plaintiff was so intimately related to the van and its overloaded condition as to leave *in him full power of self-protection, which he did not exercise*, and to which circumstances Lord Abinger, in his opinion, attached great weight.

It is true that in the early case of Farwell *v.* Boston and Worcester Railroad Corporation, the learned judge held that it was not material that the servant could not "to some extent provide for his own security" (4 Met., p.

60); but that case, though widely followed, does not appear to have been well reasoned, and is, therefore, not weighty authority for the application of the rule of exception as broadly as it is therein laid down. The opinion in that case also held that public policy demanded exemption for the master from liability, in order that the servant might be more vigilant to *protect himself* and so add to the security of all concerned, which this court repudiated in the Ross case. (Such doctrine, however, necessarily implies the *power* to protect himself.) In the latter case, also, the idea of a "distinct department" was indorsed, which in the Farwell case was condemned.

The case of the Union Pacific Railroad Company *v.* Fort (17 Wall., 655) is the first one which appears to have been considered by this court involving the exception to the general rule in favor of the master. While the decision in favor of the servant, Fort, who was injured by the negligence of a fellow-servant, was based on other grounds than his inability to control the deadly agency operated by the master, or protect himself, this feature was strongly emphasized.

Mr. Justice Davis, after stating that if the fellow-servant's order, which resulted in Fort's injury, had been given to one of mature years *he* might have protected himself by disobeying it, said:

"But this boy occupied a very different position. How could he be expected to know the peril of the undertaking? He was a mere youth, without experience, and not familiar with machinery. Not being able to judge for himself he had a right to rely on the judgment of Collett, and doubtless entered upon the execution of the order without apprehension of danger."

If the plaintiff in the case at bar had had "experience" and had been "familiar with machinery" of running trains, instead of being an unskilled day laborer, his

relation to the machinery and the human factors in its operation rendered it impossible for him to use such experience and knowledge for his protection. In the Fort case the court held that the risk was not within the contract of service, and then held the rule of *respondeat superior* applicable; again, being in conflict with the Farwell case, where it was held that the master's liability must rest on the master's implied contract or not exist.

In the case of Hough *v.* Texas and Pacific Railroad Company (100 U. S., 213), Mr. Justice Harlan, in stating the rule of exception, said:

"It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend, or are incident to, the business in which he voluntarily engages for compensation; among which is the carelessness of those, at least in the same work or employment, *with whose habits, conduct, and capacity he has in the course of his duties an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precaution as his inclination or judgment may suggest.*"

Even in the case of The B. & O. R. R. Co. *v.* John Baugh (*supra*), where the exemption of the master was sustained, the weight of this element was recognized.

Mr. Justice Brewer said:

"On the contrary, the *peril* was known and voluntarily assumed. The plaintiff admits in his testimony that he knew they had no right to the track without orders, and that there was a local train on the road somewhere between them and Bellaire; and yet, *with this knowledge*, and without protest, he voluntarily rode on the engine with the engineer."

The distinction between the position of Baugh and that of the plaintiff is sharp. Baugh knew that the engineer was guilty of negligence because it happened under his own observation. From his intimacy with

the force being then operated, and with the other factor (the engineer) besides himself in its operation, *after* the negligence had occurred to his knowledge, he knew the peril in which he stood, and had full power to step aside and avoid it.

Finally, in the case of Gardner *v.* Michigan Cent. R. R. Co., 150 U. S., 349, Mr. Chief Justice Fuller says:

"While it is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation, among which are the carelessness of his fellow-servants, with whose habits, conduct, and capacity he has in the course of his duty an opportunity to become acquainted, and against whose neglect and incompetency he may himself take precautions," &c.

The plaintiff was engaged in the repairing department and the engineer was engaged in the operating department. Therefore, being engaged in distinct departments, they were not engaged in "common work," and were not fellow-servants within the exception to the general rule exempting the master. This was held by Mr. Justice Brown, while on the district bench, in the case of a track-repairer and engineer. (Aerkfetz *v.* Humphreys.) The case does not seem to have been reported, but is referred to in Mr. Justice Brown's opinion, while on the district bench, in the case of Price *v.* Detroit G. H. & M. R. Co., sent up with the record, and to be found in 145 U. S., 651. From Mr. Justice Brown's reference to the case of Chicago and Northwestern R. R. Co. *v.* Moranda, 93 Ill., 302, it is fair to presume that he reached his conclusion on the same reasoning pursued in that case.

The theory of that case is that the rule of exemption should only apply "where the co-servants occupy such position in relation to each other as to suggest that they

could, in some way, contribute towards guarding against the danger to be apprehended."

Coal Co. *v.* MacGuire, 3 Macqueen H. L. Cas., 307;
Calvo *v.* Charlotte, &c., R. Co., 23 S. Car., 526;
Dick *v.* Indianapolis, &c., R. Co., 38 Ohio St., 390;
Pittsburg, &c., R. Co. *v.* Powers, 74 Ill., 341;
Garrahy *v.* Kansas City, &c., R. Co., 25 Fed. Rep., 258;

Toledo, &c., R. Co. *v.* O'Connor, 77 Ill., 341.

If this instruction was error, in view of the condition of the hand car, it could have done the defendant no injury, and a new trial must result the same way. On this ground this court will not reverse.

Chicago, M. & St. Paul R. R. Co. *v.* Ross, 112 U. S., 377.

Brobst *v.* Brock, 10 Wall., 519.

NEGLIGENCE OF THE FOREMAN OF THE SECTION GANG.

The court submitted to the jury whether there was negligence on the part of the foreman of the section gang in running the hand car rapidly to a dangerous point, with knowledge of the approaching train, which knowledge he concealed from the other men on the car, including plaintiff, up to that point.

As was forcibly said by the Circuit Court of Appeals, whether the foreman and the plaintiff in this particular connection would be fellow-servants under the rule, or not, it is not possible, in considering the foreman's conduct in running the car, to disassociate the condition of the car itself. The insufficient and dangerous condition of the car was the immediate cause of the injury, which would not have been incurred if the car had been sound, notwithstanding the negligence of the foreman. The

master sent out the defective car to be used and directed by the foreman, who had improperly repaired it as vice-principal, who had the knowledge of its defective state as vice-principal, and who, in negligently using it under these circumstances, must be still considered as vice-principal. The way in which the foreman used this car after, as vice-principal, he had repaired it, aided in misleading the plaintiff's mind as to its true state. The rapid running of the car was equivalent to repeated, continuous, and additional assurances to those already given by the vice-principal, who had repaired it, that it was perfectly safe. This instruction must be read in the light of the facts of the case.

But even though the instruction was error, it nevertheless could not have prejudiced the defendant. The one great, overshadowing and dominating issue in this case was the insufficiency of the hand car. It saturated and colored the whole record. The insufficiency was shown so at the trial as to be patent to the lowest order of understanding. It is not possible, therefore, to entertain the supposition that the jury could have considered and relied on this instruction to the exclusion of the master's negligence in regard to the hand car.

Where the error has worked no injury to the complaining party, it is not ground for reversal.

Cavazos *v.* Trevino, 6 Wall., 773;
Chicago *v.* Greer, 9 Wall., 726;
Brobst *v.* Brock, 10 Wall., 519.

On a new trial, the condition of the hand car alone must insure the same result. To this is added the negligence of the conductor of the first section in not showing flags, and the negligence of the officers of the second section in not giving warning at the crossing, curve, and cut.

Where on a new trial the result will remain the same this court will not reverse.

Chicago, M. & St. Paul R. R. Co. *v.* Ross, 112 U. S., 377;

Douglass *v.* McAllister, 3 Cranch, 298;

Brobst *v.* Brock, 10 Wall., 519.

ALLEGED MISTAKE OF PLAINTIFF IN JUMPING.

The court's instruction was that if defendant's negligence had placed plaintiff in a situation of extraordinary danger from which the injury to plaintiff resulted, defendant would be liable, even though plaintiff had made a mistake in attempting to escape from the threatening danger, as in jumping from the car. This instruction was correct. (See page 13, *supra*, and authorities cited)

CONTRIBUTORY NEGLIGENCE OF FELLOW-SERVANT.

If the negligence of the master produced, or had a share in producing, the injury, and the negligence of a fellow-servant contributed thereto, the master is still liable.

Grand Trunk Ry. Co. *v.* Cummings, 106 U. S., 700;

Flike *v.* Boston & Albany R. R. Co., 53 N. Y., 549.

SUFFICIENCY OF PLEADINGS AND EVIDENCE.

The questions of the defective hand car and plaintiff's want of knowledge of its insufficiency; of the negligence of the officers of the second section in approaching the crossing, curve, and cut without giving warning; of the negligence of the foreman in running the car to the dangerous point; of the contributory negligence of the plaintiff in jumping, were all put in issue by the allegations in plaintiff's complaint, to wit, the allegations of the duty on the part of defendant to furnish sufficient appliances, and to furnish necessary information as to the passing of trains to protect plaintiff; of the neglect

and failure of defendant to furnish a sufficient and safe brake; of defendant's neglect and failure to inform plaintiff of the passing of trains so as to protect him and of his consequent injury. (R. pp. 1, 2, 3, 4.)

1 Estee's Pleading and Forms, 603, 604;
Maxwell on Code Pleading, 251–257.

On all these questions the evidence was admitted without objection, and is ample to justify their submission to the jury.

Texas and Pacific R. Co. *v.* Cox, 145 U. S., 593;
Gardner *v.* Michigan Cent. R. R. Co., 150 U. S., 349;
Railroad *v.* Stout, 17 Wall., 657.

Seventeenth Assignment. (*R., p. 125.*)

This assignment is based on the proposition that the court should have directed a verdict for the defendant on "all the admissions and pleadings, and all the undisputed facts." This covers the whole case, and is discussed in the preceding pages.

Eighteenth Assignment. (*R., p. 125.*)

This is based on the court's denial of the defendant's motion for a new trial.

The granting of a new trial is entirely within the discretion of the trial court, and its action in that regard is not subject to review.

Wilson *v.* Everett, 139 U. S., 616;
Indianapolis R. R. Co. *v.* Horst, 93 U. S.;
Newcomb *v.* Wood, 97 U. S., 581;
Parsons *v.* Bedford, 3 Pet., 433;
Barreda *v.* Silsbee, 21 How., 146.

Respectfully submitted.

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MAR 25 1896
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE NORTHERN PACIFIC R.R. CO.
PLAINTIFF IN ERROR,
v.
HUGH CHARLESS.

No. 184.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Reply Brief for Plaintiff in Error.

C. W. BUNN,
Counsel for Plaintiff in Error.

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Supreme Court of the United States.

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THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR, v. HUGH CHARLESS.	No. 184.

Reply Brief for Plaintiff in Error.

In reply to the proposition that certain exceptions to the charge below were not taken in proper season to be considered in this Court, we beg to submit:

The record shows that counsel first requested the Court to direct a verdict for defendant, and took an exception to the refusal. This was before the charge. Then the Court charged the jury, and the record, p. 85, says that certain instructions, "immediately upon the retirement of "the jury, were excepted to by the defendant, through his "counsel, which exceptions were by the Court then and "there allowed." Then each instruction is quoted, and the statement follows each: "To the giving of which in-"struction defendant excepted, * * * which said ex-"ception was then and there allowed by the Court."

No authority is cited holding that an exception "*allowed*

" *by the Court*," taken immediately on the retirement of the jury and before verdict, is bad in law.

The reason why an exception is required to be taken in season is that the trial Court may correct an error before verdict. Up to the return of the verdict a cause and the jury are in the hands of the Court, and the jury may be recalled and given other instructions.

As to the precise manner and time of taking exceptions large discretion is necessarily vested in the trial Court, and so long as exceptions are *allowed* by the trial Court and taken during the trial while errors are subject to correction, there is no good *reason* why an appellate Court should disregard them.

The exceptions in this case were taken at and during the trial. In *Sheppard* v. *Wilson* (6 How. 260, 276) the Court said: " For the original authority under which bills " of exceptions are allowed has always been considered " to be restricted to matters of exception *taken pending* " *the trial and ascertained before verdict.*" This language was quoted from *Walton* v. *United States* (9 Wheat. 657). In *Dredge* v. *Forsythe* (1 Black, 563, 567) the Court overruled an objection to the bill of exceptions, saying it was entirely without merit. The bill in that case stated: " The following exceptions were made by the defendants " upon the trial of this cause," and that the same were " allowed by the court." The Court said: " Undoubtedly " the rule is that the record must show that the exception " relied on was taken and reserved by the party at the " trial." In *French* v. *Edwards* (13 Wall. 506, 516), Justice Field said of a bill of exceptions: " It shows that the " exceptions were taken at the trial, and that is sufficient." In *Stanton* v. *Embry* (93 U. S. 548, 555), the bill stated that the exceptions were " taken at the trial of the cause." The Court said: " Beyond doubt the record must show

" expressly or impliedly that the exceptions were taken " and reserved by the party at the trial." In *Ry. Co.* v. *Heck* (102 U. S. 120) the rule is thus stated by Waite, C. J.: " Unless an objection was made and exception taken " before the verdict, no case is presented for a review " here of the rulings at the trial." In *United States* v. *Cary* (110 U. S. 51, 52) it is again said: " The rule is " well established and of long standing that an exception " to be of any avail must be taken at the trial." In *Stewart* v. *Wyoming Ranche Co.* (128 U. S. 383, 390) the Court says: " It is a conclusive answer to this objection " that no exception was taken to this instruction at the " time it was given or before the verdict was returned."

It is true that in *Phelps* v. *Mayer* (15 How. 160), and in two or three other cases, this Court has said exceptions should be taken " while the jury is at the bar." But what is meant by the expression, " while the jury is at the bar "? Not, we submit, while the jury is in any particular location. It does not mean while it is physically in front of the judge's bench, or within hearing, for the exceptions are not addressed to it. It means while the jury is in the hands of the Court, and errors excepted to are subject to correction, which is any time before verdict, in the discretion of the trial Court. To say the contrary is sticking in the form of words.

Moreover, this Court has not intended to lay down different rules of law when it said exceptions must be taken before verdict and when it said they must be taken while the jury is at the bar. The two expressions have been used as synonymous and as giving form to the same rule of law, which is essentially that exceptions shall be made while errors are subject to correction, *i. e.*, before verdict. It is every-day practice for Courts to recall juries for the purpose of further instructions to correct errors. It is